

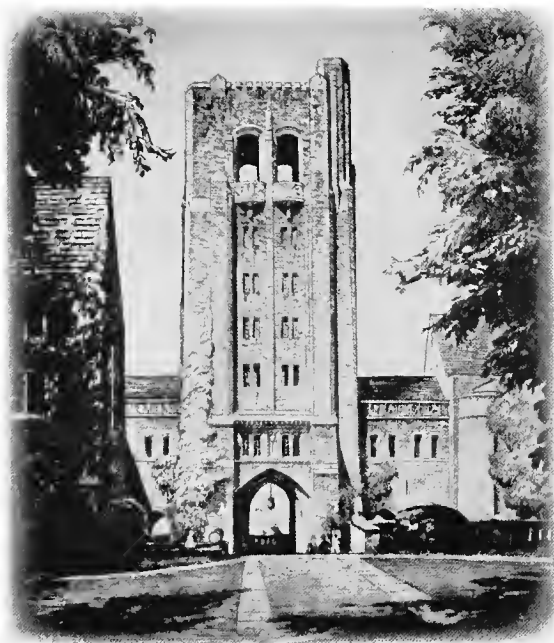
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ILLINOIS CASES

ON

EQUITY JURISPRUDENCE

PART II



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PREFACE

This selection of cases has been collected during an experience of several years in teaching the subject of Equity Jurisprudence in The John Marshall Law School, Chicago, Ill., and is to be used in connection with the teaching of that subject to supplement and illustrate the text books used.

It is the first attempt to collect the leading Illinois Equity decisions, and it is hoped it will be found valuable to other law schools and to attorneys in actual practice in setting forth some of the most important equitable maxims and principles.

The head notes, arguments, and the names of attorneys have all been omitted, as have also, in certain cases, the statement of the case and parts of the opinion, such omission in the opinion being shown by asterisks, thus * * * The omitted parts of the opinions dealt with questions of common law which were not necessary to the decision of the equity point involved.

I desire to express my appreciation to Edward T. Lee, Dean of The John Marshall Law School and to Morris St. P. Thomas of the Chicago Bar, my predecessor in this department for many valuable suggestions and assistance in revising the selection of cases.

MORTON S. CRESSY.

Chicago, December, 1909.



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CHAPTER IV.

NOTICE.

SECTION 1.—NOTICE OF UNRECORDED DEED.

DOYLE v. TEAS.

4 Scam (5 Ill.) 202.

[Supreme Court of Illinois. December Term, 1843.]

Can-ton, Justice, delivered the opinion of the court: (1) This bill was filed in the Hancock circuit court for the purpose of compelling a specific performance of an agreement for the sale of two lots of land in that county. The agreement, which is set out in the bill verbatim, appears to have been entered into on the 23rd of May, 1835, and provides for the sale of the premises in question for the sum of \$1100, of which "a certain sum" was to be paid in hand on the second of June then next; one stable horse from the first to the tenth of July then next, the value of which was to be assessed by three disinterested persons, in case of disagreement between the parties, and Doyle was to give his note for the balance of the \$1100, payable in fifteen months from the date of the agreement. The circuit court entered a decree dismissing the bill at the complainant's cost, which, by this appeal, we are now called upon to revise.

The first enquiry which most properly presents itself in the examination of this case is whether Munson, one of the defendants in the bill, is a subsequent bona fide purchaser without notice, or whether he is chargeable with notice. It appears that the contract with the complainant was entered into on the 23d of May, 1835, and was recorded on the 19th of June following, and the deed of the same premises from Teas to Munson was executed on the 26th of May and recorded on the 26th of June. If Munson is chargeable with notice, then

he but fills the shoes of Teas, and either as his trustee for that purpose, or as his assignee, he shall make good the obligations which, by the contract, are imposed upon Teas. If he was not chargeable with such notice when the deed was executed or took effect, then he shall hold under it, notwithstanding whatever rights, either legal or equitable, may be shown to exist between Doyle and Teas.

What is sufficient to constitute this notice is frequently a question of no small difficulty and a subject on which much has been written, and, after all, not a great deal very definitely settled. This notice is sometimes a question of law arising upon facts about which there is no dispute, and it is sometimes a question of fact. The former is called constructive notice, the latter actual notice. Constructive notice is made out frequently by a *lis pendens*, by the record of the prior title or claim under the recording act; by the possession of the person having notice, or by the purchaser receiving his title through a channel which, with proper attention, would have led him to a knowledge of the interests with a notice of which he is charged.

In this case it is attempted to make out notice in both of these ways, or rather, in the first place, an attempt is made to bring home actual notice to the agent of Munson who made the purchase for him—which, if established, is but another mode of proving constructive notice on that defendant himself, whereby his conscience shall be as much affected as if the actual notice were proved on him personally;—and in the second place it is contended that constructive notice is made out under our recording act.

The greatest difficulty has been experienced in laying down any general rule by which the court can be governed as to the amount of evidence which is necessary to make out actual notice; for between the slightest and most indefinite (which, if shown to have reached the ears of the defendant, could raise no suspicion of good faith on his part), and the most positive proof of actual knowledge, brought directly home to the person of the party, there is an infinite number of gradations, and where the true line of demarcation is between these

two extremes has never yet been so distinctly settled as to leave no difficulty in the application to individual cases as they arise.

There seems, indeed, to be two classes of cases, one of which appears to require the most clear and certain evidence of actual knowledge, such as will establish fraud on the part of the subsequent purchaser, while, in the other, only such notice is required to be proved as would be sufficient to put a prudent man on enquiry; and I confess I have searched in vain to find the distinction anywhere laid down by which we may be enabled to distinguish them in their features and circumstances. In this case the complainant insists that it was only necessary for him to adduce sufficient proof to bring the case within the latter rule; while, by the defendant Munson, it is contended that he is only to be prejudiced by such clear and positive proof of notice as would establish fraud in him; and for the purpose of enabling us the better to judge by which of these rules we shall be governed in determining what shall be the amount of evidence required to make out this notice it is necessary to advert to some of the leading cases relied upon in support of each position.

In the case of *Hines v. Dodd*, 2 Atk. 275, where a subsequent mortgagee was attempted to be charged with notice of a prior judgment, which was not registered till after the mortgage, although the denial of the notice by the defendant was feeble, and, to say the least, evasive, and the proof of the notice strong, still the court held the proof insufficient, and say: "To be sure apparent fraud, as clear and undoubted notice, would be a proper ground of relief, but suspicion of notice, though a strong suspicion of notice, is not sufficient to justify the court in breaking in upon an act of Parliament." And on the same side is cited the case of *Joland v. Stambridge*, 3 Vesey 478, where a subsequent registered conveyance took precedence of a prior unregistered deed, notwithstanding strong evidence of notice; and this case seems to carry the principle quite as far as the case above, and clearly holds that nothing short of actual fraud shall supersede a conveyance actually recorded.

So in the case of *Wyatt v. Barnell*, 19 Vesey 435, where the question was whether there was sufficient proof of notice to give the prior unregistered deed a preference (and there was very strong proof of constructive notice), yet the master of the rolls held it insufficient, and after alluding to the decisions says: "However, it is sufficient for the present purpose to say, that it is only by actual notice clearly proved, that a registered conveyance can be postponed. Even a *lis pendens* is not deemed notice for that purpose." This case then holds distinctly that no constructive notice will suffice to defeat a deed regularly registered; but this cannot be pretended to be the law now.

In *Dey v. Dunham*, 2 Johns. Ch. R. 182, most of the above cases were cited with approbation by chancellor Kent. The question there was whether a junior registered assignment should be set aside in favor of a prior mortgage deed, which was not registered in the proper book of mortgages. The chancellor says: "If notice that is to put a party on enquiry be sufficient to break in upon the policy of the express provisions of the act, then indeed the conclusion would be different; but I do not apprehend that the decisions go that length. This would be too slight a foundation to act upon in opposition to the statute."

In *Jackson v. Van Valkenburgh*, 8 Cowen 260, the question again arose as to the sufficiency of the parol proof of notice, to give effect to a prior unrecorded mortgage; and although the proof was strong to establish notice to the agent of the subsequent mortgagee, yet the court held it insufficient, and says: "It may have answered to put a person on enquiry, in a case where that species of notice is sufficient, but we have seen, to supply the place of registry, the law proceeds a step further, and as it appears to me upon the most substantial reasons, for if the second conveyance is not regarded as bona fide, because, in consequence of notice, it is tainted with fraud, and that imputation ought not to rest on slight grounds, but be supported by evidence clear and explicit." The same doctrine was also held in the case of *Jackson v. Givan*, 8 Johns. 137, by chief justice Kent, where the

question was, which deed was the best, the first in date, or the first on record?

Jackson v. Burgatt, 10 Johns. 457, presents one of the few instances to be met with where the unregistered deed has been allowed to triumph over the registry, in an ejectment case. The court in that case says: "That the defendant and every other person through whom he derived title, had, at the time of their purchase, actual notice of the prior conveyance." "The purchase of Tiffany had every appearance of a gross fraud," etc. In this case we find the same strict rule held, as to the character of the notice, which must be proved to effect the object sought; but by looking into the evidence reported in the case, we find that the rule laid down, by Mr. Sugden (*Sug. on Vend.* 490, Ch. 8), "that to constitute a binding notice, it must be given by a person interested in the property, and in the course of the treaty for the purchase," was not observed, but the notice which fastened the fraud on the defendant and his grantors, was communicated by Towzer and Throop, neither of whom appears to have ever had any interest in the premises.

In discussing this branch of the law, chancellor Kent, in his commentaries, 4 Kent's Com. 171, says: "the doctrine of notice and its operation in favor of the prior unregistered deed or mortgage, equally applies, as I apprehend, throughout the United States; and it everywhere turns on a question of fraud, and on the evidence requisite to infer it. In pursuance of that principle, and in order to support, at the same time, the policy and the injunctions of the registry acts, in all their vigor and genuine meaning, implied notice may be equally effectual, with direct and positive notice; but then it must not be that notice which is barely sufficient to put the party on enquiry;" and judge Story (1 Story's Eq. 393) holds substantially the same rule, though not perhaps in quite so strong language. He says, when the first deed is not properly recorded, "then the subsequent purchaser is affected only by such actual notice as would amount to a fraud."

It is perhaps unnecessary to cite further from the books, to show what is the effect to be produced when that clear and distinct proof of notice has been required which should be

sufficient to prove the subsequent purchaser guilty of a fraud, and which should be something more than enough merely to put the party on enquiry. In all the instances referred to, (and I have met with none of a different character,) it is clear that it is to give effect and priority to an unregistered instrument, which by the registry act is required to be recorded, in preference to one subsequent in date, which has been duly recorded.

But by looking through the cases it will be frequently seen, that what one judge holds to be only sufficient to put a party on enquiry, another will hold sufficient of itself to prove him guilty of fraud; thus showing more a difference in terms, than in substance; while others, professing to adhere to the same measure of proof, have really differed very widely in the amount required.

Let us now turn our attention to that class of cases where it has been held sufficient to show such notice as should put a party on enquiry.

In *Smith v. Low*, 1 Atk. 49, the case was this. The mother of some infants leased their land for forty-one years, with covenants that they should join, etc., after they became of age. They received the rents for a long time, and then brought ejectment, and the bill was filed against them to confirm the lease, and the court held that the lease should be established, and said: "They found a person in possession of the estate, and that was sufficient to put them to enquire; and what is sufficient to put the party on enquiry is good notice in equity." It may be remarked in relation to this case, and the same remark will apply to most if not all of the subsequent cases, that no question is raised in relation to the registry act, but the court simply decides that possession by the tenant was such notice to the heirs, as should bind them by their acquiescence; and I apprehend that it is too late at the present day to deny the sufficiency of such notice whether the registry act be involved or not.

Faires v. Cherry, 2 Vern. 384, is also cited in support of the proposition, that if the party is put to enquire, it is sufficient. There, at the time of the purchase, the defendant had in his possession, among other papers, the settlement under which

the plaintiff claimed, and the court held him chargeable with notice; and although this case was afterwards doubted, yet it is now one of the most familiar instances of conclusive notice. And I venture to say such proof has never been held insufficient. To the same effect is the case of *Parker v. Brooks*, 9 Vesey 583. There it was held where the deed under which the defendant holds recites the grounds of the other party's equity, that he shall be chargeable therewith.

Daniels v. Davidson, 16 Vesey 249, was a bill for the specific performance of an agreement for the sale of land, and in that case it was held that the possession of the complainant, although he held the possession not under the agreement but under an unexpired lease, was such notice as should have put the party on enquiry, and was therefore sufficient against the subsequent purchaser. It may be observed here, that under the registry laws of England, this agreement was not required or even allowed to be recorded.

In the case of *Starry v. Arden*, 1 Johns. Ch. R. 261, it does not appear that either deed was recorded, nor is the registry act once alluded to. There the court held the defendant chargeable with notice, on what seems to me very light grounds. The chancellor says: "I shall also consider him a purchaser without actual notice of the settlement on the plaintiffs. He declares in his answer that he had no knowledge or notice of the conveyance of 1805, when he purchased, and there is not proof to contradict this answer. But I hold him chargeable with constructive notice or notice in law, because he had information sufficient to put him on enquiry. He admits that before the execution of the deed, he had heard that the grantor had made some provision for his daughters, out of the property in Greenwich street; and there is no evidence in the case that the grantor owned any other property in that street." Here he holds constructive notice equivalent to actual notice. This case was affirmed in the court of errors.

In the case of *Green v. Slater*, 4 Johns. Ch. R. 39, it was held that a *lis pendens* was sufficient notice to put the party on enquiry, although the description of the premises in the bill was so very general and uncertain, that it was impossible

for the party to determine that the lands which he purchased were included in those described as "divers lands in Crosby's Manor;" and in that case the defendant in his answer denied all knowledge of the pendency of the suit, and there was no proof against the answer.

It is perhaps unnecessary to pursue this class of cases further; enough have already been presented to show the general characteristics of those cases where it has been held sufficient notice to show such knowledge as should put the party on enquiry. Most elementary writers on the law of evidence, however, where they lay down this rule, speak of it as applicable to all cases in equity where notice is required. Thus Mr. Justice Story, in his commentaries on equity, (1 Story's Eq. 388,) after stating what has been held sufficient evidence of notice in some particular cases, proceeds: "Indeed the doctrine is still broader, for whatever is sufficient to put a party on enquiry, (that is whatever has a reasonable certainty, as to time, place, circumstance, and persons,) is in equity held to be good notice to bind him;" and this is said of such notice as shall postpone a subsequent registered deed or mortgage. And Chancellor Kent, in his commentaries, (4 Kent's Com. 179,) says. "The doctrine of notice is also of very extensive application throughout the law of mortgage; and it is very greatly surcharged with cases abounding in refinements. It is indeed difficult to define with precision the rules which regulate implied or constructive notice, for it depends upon the infinitely varied circumstances of each case. The general doctrine is, that whatever puts a party upon enquiry amounts in judgment of law to notice, provided the enquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the fact, by the exercise of ordinary diligence and understanding."

I confess, after all the investigation I have been able to give the subject, that I am still unable clearly to comprehend the distinction in principle, or rather the difference in circumstances, between those cases where the stronger evidence is required, and those cases where such evidence has been allowed to prevail as it was said was sufficient to put the party upon enquiry. Nor have those learned commentators from

whom I have quoted above, that I am able to discover, told us the distinctions, between the cases where they say that such notice as should put the party to enquire will suffice, and where not. Thus we find Judge Story, at page 393, above quoted, for the purpose of postponing a subsequent purchaser, whose deed is recorded, requiring proof of "such actual notice as would amount to a fraud," and the same rule is substantially laid down at page 387, in § 398; while in the next two succeeding sections, for precisely the same purpose, we find him holding that constructive notice answers every purpose of actual notice, and that it will amount to such constructive notice, if enough be shown to put the party upon enquiry.

So also we have seen chancellor Kent, at page 171, saying that, for the purpose of giving the prior unregistered deed or mortgage a preference, implied notice may do; "but then it must not be that notice which is barely sufficient to put the party upon enquiry;" and yet we find him at page 179 when speaking of the doctrine of notice, as applied to the law of mortgage, laying down the unqualified rule, "that whatever puts a party upon enquiry amounts in judgment of law to a notice."

It is however worthy of remark, that in the first class of cases to which reference has been had, where the greatest amount of evidence has been required to prove the notice, we uniformly find an effort made to give priority to an unregistered deed or mortgage, which was not only authorized but required by law to be recorded over one of the same or a similar character, which although subsequent in date, was in fact first recorded; and this is what has been termed, breaking in upon the statute, or doing away, in the particular instance, with the registry act and its manifest policy, by a party thus attempting to excuse himself from doing that which the law required should be done. Some judges have regretted that the door was ever opened for letting in such proof at all; but the consideration, that without that, the law would often be used as an engine of fraud and oppression, has triumphed over these scruples. I will repeat that this has been the case in every instance where such great strictness has been required in the proof of notice. In those cases, however, where such notice as would occasion enquiry has been held sufficient,

no question arose in relation to the registry act, but the object generally sought to be attained was to give effect to a prior equity, which, by the law, the party was not allowed to record, so that he was obliged to resort to other and less certain means to establish the notice. There may, indeed, be a reason why a party who can, by getting his title recorded, give notice to all the world of exactly the nature and extent of his interest, and neglect to do it, should be required to give stronger proof, when he attempts to establish notice, by another and less certain mode, than the one to whom the law has afforded no means of giving that universal and conclusive notice which the registry act affords.

But as I have nowhere seen the distinction which these cases would seem to indicate, laid down in terms, I do not feel authorized to present it as an undeniable proposition that the evidence of notice must be stronger where the proof of the notice is to support an instrument that might be recorded, than in other cases; especially where, as before remarked, the difference has been more in name, than in reality, in most of the cases. So that after all, hereafter, as heretofore, each case must be governed by its own peculiar circumstances; and where the court is satisfied, that the subsequent purchaser acted in bad faith, and that he either had actual notice, or might have had that notice, had he not wilfully or negligently shut his eyes against those lights, which, with proper observation, would have led him to acknowledge, he must suffer the consequence of his ignorance, and be held to have had notice so as to taint this purchase with fraud in law. It is sufficient if the channels, which would have led him to the truth, were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequence of his ignorance. The law will not allow him to shut his eyes when his ignorance is to benefit himself, at the expense of another, when he would have had them open and enquiring, had the consequences of his ignorance been detrimental to himself, and advantageous to the other.

As it is not pretended that Munson, at the time of the pur-

chase, had personal notice of the complainants' interests it becomes necessary to enquire, by the application of these rules to the evidence, whether Mrs. Cutler, the avowed agent of Munson, had such notice; for, if she had, it was constructive notice to Munson. 2 Powell on Mort 581; 3 Atk. 646; Fonbl. Eq. 420; Principal and Agent 283; Story on Agency 131, 140. But the attempt to charge Munson with Kimball's knowledge cannot be sustained. Did the evidence show that Kimball, as the agent of Munson, negotiated the purchase, and that Munson subsequently recognized his authority, by adopting his acts, he undoubtedly would become as much his agent, by adoption, as he could have been by appointment. Story on Agency 245; Principal and Agent 286; 2 Powell on Mort. 584; 2 T. R. 188. But such is not the proof when the evidence is all considered. I am satisfied that the proper conclusion from the evidence is, that Kimball really had nothing to do with the matter, more than to ascertain at the request of Mrs. Cutler, the price which Teas placed upon the land and again communicate to him her determination to take it. The part that Kimball performed was that of messenger, rather than negotiator. It would be hard to hold Munson responsible for Kimball's knowledge, because he did this errand for Mrs. Cutler. He did not pretend to represent Munson, or to exercise any authority or discretion in the matter, but he simply performed an office, which would probably not have been required, had not the agent been a female. In order to make an adopted agency, the acts performed must be such as would make the agent responsible, if not assumed by the principal.

Let us then see whether Mrs. Cutler had such information of Doyle's prior equitable claim, as to have charged Munson with personal notice, had he been aware of the same facts.

Wood is the only witness who pretends to swear to anything definitely on the subject. He testifies, that in the fall or winter of 1834, he was doing business with Mrs. Cutler, in relation to her late husband's estate, and that he then informed her of Doyle's purchase, and advised her not to buy the land, which she was then negotiating for. On the other hand, Mrs. Cutler distinctly and positively denies ever having had any information

or notice, from any source whatever, of Doyle's purchase or interest. The only possible way that we can reconcile these contradictory statements, consistently with the integrity of the witnesses, is to suppose that Wood's memory is as treacherous as to the time when he had this interview with Mrs. Cutler, as it is in relation to the time when the contracts were made; and he swears with as much confidence and as many circumstances, that both purchases were made in the summer or fall of 1834, which is the time he gives for his first acquaintance with Mrs. Cutler, as he does as to the time when he had the interview with her in relation to Doyle's interest. It should be borne in mind that but three days intervened, between the sale to Doyle and the Munson purchase, the one having been made on the 23d and the other on the 26th of May, 1835, and I think it no more improbable that Wood should be mistaken a few days as to the time of this interview, than it is remarkable that he should be mistaken from six to nine months as to the time when the contracts were made. But, let this be as it may, the most that can be said for the testimony of Wood is, that it should be set off against that of Mrs. Cutler, and then we are left to ascertain from the other evidence whether there is sufficient proof to fix notice on this agent.

The only remaining testimony which goes to prove notice on Mrs. Cutler is that of Atchison, and he speaks only of indistinct recollections and vague impressions, without professing or pretending to give anything certain or satisfactory on the subject. He says that it is his impression that he had a conversation with Mrs. Cutler on the day that she purchased of Teas, and he thinks that in that conversation, the sale from Teas to Doyle was spoken of; but he says he cannot recollect any part of that conversation that he would be willing to swear to, nor does he know, he says, that Mrs. Cutler, at the time she made the purchase, knew of the sale to Doyle, but his impression is that she did. This is altogether too indefinite and unsatisfactory to be relied on, standing alone as it now does. The most that it can do is to raise a suspicion or remote probability that she may have heard of Doyle's interest. Were the evidence satisfactory that she had heard of that

sale before she purchased, from a source entitled to any reasonable credit, and under circumstances not likely to be forgotten, I would hold that the duty had devolved upon her of tracing the matter out, and ascertaining its truth, to the same extent that she would have done had she been making the purchase for herself, knowing that she must suffer the loss, if she purchased the land when Doyle had an equitable interest. For the want of such proof, notice is not made good upon her.

It now remains to be considered upon this branch of the case, what influence our recording laws have, because the complainants, having failed to make out a notice in any other way, unless our recording act helps them out, there is an end of the case. Our registry laws, unlike any other of which I have any knowledge, require that "all grants; bargains, sales, leases, releases, mortgages, defeasances, conveyances, bonds, contracts, or agreements, of and concerning any lands, tenements; or hereditaments, or whereby the same be affected in law or in equity, whether executed within or without this state, shall be recorded," etc. (Gale's Stat. 152) and a subsequent act, (Gale's Stat. 664,) provides "That from and after the first day of August next, (1833,) all deeds and other title papers which are required to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors, and subsequent purchasers without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record in the county where the said lands may lie." No question can be made but that this agreement is embraced in the act first quoted, so that it was as much the right and the duty of Doyle to get this agreement recorded, as it was of Munson to place his deed upon record; and the effect of recording the agreement was precisely the same, so far as protecting his rights and interests was concerned, as it would have been had it been a deed. The agreement of the complainant is dated on the 23d of May, and is recorded on the 19th day of June, 1835. Intermediate the date and recording of this agreement, on the 26th of May, the deed to Munson is dated, but it was not recorded till the

26th of June, seven days after the agreement was recorded. As the effect of a compliance with the recording act was to operate as constructive notice to all the world, that the object is as much accomplished by the recording of an agreement as of a deed. What then would have been the effect on Munson's title, had Doyle received a deed with date and record the same as the agreement? Beyond all doubt, his deed being prior in date, and first on record, and bona fide, must take precedence of one subsequent in date and subsequently placed on record. The word subsequent, as used in the recording act, must have reference to the recording, and not to the date of the instrument, and such indeed is its literal and grammatical construction. As between the grantor and grantee, the transaction is complete upon the execution and delivery of the deed; but as between the grantee and third persons, without notice, the purchase may be said not to be complete till the title paper is left for record. So here, as between Teas and Doyle, the purchase was complete such as it was, upon the execution and delivery of the agreement, but as to third persons it was not complete until the 19th of June when the record was made; and by the same rule Munson's purchase was not complete till the 26th, seven days after. As Doyle completed his purchase, such as it was, first, he must be entitled to the benefit of his superior vigilance and earlier date. Let us look at the consequences that would result from a different construction. Should we now postpone Doyle, because Munson is an innocent purchaser subsequent to the date of his agreement, then Munson would have to be postponed in his turn, should some one appear to-morrow, and produce a deed executed between the 26th of May and the 26th of June, 1835, because, he would be a subsequent bona fide purchaser! Yes, subsequent to the date of this deed. Or, to make the absurdity of such a construction, if possible, still more palpable, had Doyle not made his purchase till a few days after the date of Munson's deed, no matter when his agreement was recorded, then because he would occupy the exalted position of a subsequent bona fide purchaser, he would have been beyond the reach of danger, unless he was chargeable with no-

tice, and the burthen of proving this notice would have been thrown on the other side.

Decree of Circuit Court affirmed.

Acc. *Weigel v. Green*, 218 Ill., 221; *Lowden v. Wilson*, 233 Ill., 340.

SECTION 2.—POSSESSION AS NOTICE.

CARR v. BRENNAN et al.

166 Ill., 108; 47 N. E. R., 721.

[Supreme Court of Illinois. April 3, 1897.]

Appeal from circuit court, Lasalle county; George W. Stipp, Judge.

Suit by Robert Carr against John Brennan and others. Decree for said Brennan, and complainant appeals. Affirmed.

Wilkin, J. John and Ellen Brennan were husband and wife, residing in the city of Lasalle, Lasalle county, Ill. The wife held the title to certain real estate, consisting of lots in the city and farm lands in that vicinity. In the month of March, 1893, being in failing health, she deeded this property to her husband, John Brennan, and died on December 5th following. The deed was never recorded, but was lost or destroyed. Ellen Brennan died, leaving two children,—a son and a daughter, Mary Ann—her only heirs, her surviving. The daughter had married prior to the death of her mother, and her name was then Cannon. On July 5, 1894, she went to the city of Ottawa, and there conveyed to appellant, Robert Carr, an undivided half interest in the said real estate; and he on the 11th of that month filed a bill in the circuit court of that county for a partition of the lands between the son and himself, as the owners of the lands, and for the assignment of the dower of John Brennan. Brennan, having answered that bill, filed a cross bill setting up the conveyance by the wife, Ellen Brennan, to himself, in March, 1893, and alleging that Robert Carr took his deed from Mary Ann Cannon chargeable with notice of that conveyance, and claiming title to the premises in fee. The circuit court, upon a hearing of the bill, cross

bill, answers, and replications, found in favor of the complainant in the cross bill, John Brennan, and decreed accordingly. From that decree this appeal is prosecuted.

The evidence clearly establishes the fact of the execution and delivery of the deed from Ellen Brennan to her husband, and also that that deed was either lost or destroyed without the fault of the grantee. There is some evidence tending to prove that, although the legal title to the property had been in the wife, the husband was at least the equitable part owner thereof. It also appears that, at the time of the death of Ellen Brennan, Mary Ann Cannon came to the home of her father and mother, and remained there until the date of her going to Ottawa, July 5th, and making the conveyance to appellant, Carr; and facts appear in evidence from which it might be inferred that she destroyed the deed. Whether, however, John Brennan was in any sense the equitable owner of the property, and whether, Mary Ann Cannon had anything to do with the loss or destruction of the deed, are facts of no controlling importance in the decision of the case. Neither do we attach any great importance to the fact that the circumstances under which appellant claims to have purchased the interest of Mary Ann Cannon are more or less calculated to throw suspicion upon the bona fides of the transaction. The evidence is full and clear to the effect that from the making and delivery of the deed, in March, 1893, to the bringing of this action, John Brennan was in the open, adverse, and exclusive possession of all the property. This fact, with the proof of the execution and delivery of the deed together with the loss or destruction thereof, fully sustained the decree of the circuit court upon the cross bill. It was said in *Coari v. Olsen*, 91 Ill. 280: "But, although other courts have held the doctrine of notice of possession as subject to being materially modified by circumstances, this court has uniformly held that actual occupancy is equal to the record of the deed or other instrument under which the occupant claims, and a purchaser is bound to inquire by what right or title he holds. The

purchaser takes the premises subject to that title or interest, whatever it may be;" citing a large number of previous decisions of the court. An attempt is made in the argument of counsel to distinguish and take the case out of this rule upon the ground that the possession of the husband, as is said, was the same before the making and delivering of the deed as afterwards. In other words, the contention seems to be that possession, to take the place and answer the same purpose as the recording of a deed, must be possession taken under the unrecorded conveyance, and not a mere continuation of a present possession. This contention is not supported by the decisions in Illinois, but, on the contrary, it was said in *Coari v. Olsen*, supra: "So far, at least, as the facts of the present case are concerned, we adhere to the common-law rule that, where a tenant changes his character by agreeing to purchase, his possession amounts to notice of his equitable title as purchaser;" citing authorities. In *Bank v. Sperling*, 113 Ill. 273, Theodore F. and Abraham B. Sperling purchased certain real estate, taking the title to themselves jointly, which was duly recorded. Subsequently Abraham B. rented his undivided interest to Theodore F., who paid rent for such interest until 1877, when he purchased the undivided interest of Abraham B., taking a deed therefor, which he failed to have placed upon record. The Farmers' National Bank subsequently obtained a judgment against Abraham B., and levied an execution upon the real estate, and it was sold and bid in by the bank, its certificate of purchase being duly recorded. On bill by Theodore F. Sperling, claiming to be the sole owner of the premises at the time of the execution sale, that certificate of purchase was set aside. On appeal to this court that decree was affirmed. One of the grounds of reversal urged being that the possession of Theodore F. under the circumstances, was not constructive notice that he was sole owner of the property, the court, in passing upon that point, said: "This court has held, in opposition to the rule quoted by counsel for appellant from *Wade*, Notice, §§ 297, 298 and *Emmons v. Murray*,

16 N. H. 386, that the actual, open, and visible, possession of real estate is constructive notice to persons purchasing it of whatever rights the possessor then has in the land. In *Coari v. Olsen*, 91 Ill. 273, we held, in obedience to what we understood to be the common law, and upon the faith of authorities therein referred to, that, where a tenant changes his character by agreeing to purchase, his possession amounts to notice of his equitable title as purchaser. In *Haworth v. Taylor*, 108 Ill. 275, we held that the possession of a tenant is constructive notice of the actual title of the landlord at that time, although that title was acquired subsequent to the time the landlord leased to the tenant. It was there said: 'As, at the date of the lease, Taylor was not the owner of the land, but acquired title subsequently, on November 13, 1865, it is contended that the notice from the tenant's occupancy was notice only of Taylor's (the landlord's) rights at the time of the making of the lease, and not of the rights at the time of Haworth's deed, December 26, 1866. We do not concur in this view, although the authority cited (*Emmons v. Murray*, 16 N. H. 398) lends somewhat of countenance to it. We regard the doctrine, as derived from the decisions of this court, to be that where one purchases land of which another is at the time in actual, open, and visible possession, such possession is constructive notice to the purchaser of all rights whatever of the possessor in the land at the time of the purchase.' " The possession of the grantee, John Brennan, had the same effect to charge appellant, Robert Carr, with notice of the deed, as though it had been recorded.

Something is said in the argument about the conveyance from the wife to the husband being illegal and void, as to one piece of the property conveyed, upon the ground that it was at the time the homestead; the contention being that a conveyance of the homestead by a husband or wife to the other, not joined in by the other, is void. In the first place, we do not think the evidence sufficiently establishes the fact that the property conveyed was at the time occupied as a homestead; and, in the second place, no issue as to the validity

of the conveyance upon any such ground is made by the pleadings. It is not claimed in the original bill nor in the answer to the cross bill that the deed from the wife to the husband was ineffectual to convey any part of the property because it was a homestead. We think the decree of the circuit court was fully authorized by the evidence, and it will accordingly be affirmed.

SECTION 3.—RECITALS IN TITLE PAPERS.

DEAN AND OTHERS v. LONG AND OTHERS.

122 Ill., 447; 14 N. E. R., 34.

[Supreme Court of Illinois. November 11, 1887.]

Appeal from circuit court, Kane county; J. G. Wilson, Judge.

This was an action to recover possession of certain land, brought by a trustee who had obtained a patent on the land in trust for his wife and her children, and by Elizabeth Long and her children, who were the cestuis que trust specified in the patent, against one Dean, who had purchased the land from Hadden, who was a purchaser from Robert Furniss Long, the trustee. The remaining facts sufficiently appear in the opinion.

Schofield, J. We have arrived at the same conclusion reached by the chancellor below, but by a somewhat different process of reasoning. We are inclined to think the depositions of Robert Furniss Long and Elizabeth Long, two of the complainants, taken after the death of Hadden, were incompetent to be read in evidence as against his heirs at law, and they prove nothing that we deem of any moment against Dean, his grantee. But, omitting those depositions, the patent establishes beyond all question that the only title that Robert Furniss Long had in the land was as joint trustee with Robert Whatkinson Long for the wife of the former, Elizabeth Long, and her children. The patent recites that "Robert Furniss Long, and Robert Whatkinson Long, in trust for Elizabeth Long and her children, of Cook county, Illinois, have deposited in the land-office of the United States, a certificate of the registers

of the land-office at Chicago, whereby it appears that full payment has been made by the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid," for the tract of land therein described, adding: "which said tract has been purchased by said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid." And the land is therefore conveyed unto the said Robert Furniss Long and Robert Whatkinson Long, trustees as aforesaid. There is nothing in the record tending to contradict this recital, and it must therefore be accepted as conclusive as to the facts recited, and therefore that a trust only is conveyed by the patent.

The case is unlike *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swaynee*, 83 Ill. 336; and *Kirkland v. Cox*, 94 Ill. 400,—where it was held that under the operation of section 3, c. 24, Rev. St. 1845, a conveyance in trust or to the use of any person, which requires no duties, prescribes the execution of no trust, but leaves the trustee only a passive title, carries to the cestui que trust lawful seizure, estate, and possession. The trust here created is for a married woman and her children. At the date of its creation she was not, under the law then in force, *sui juris* in all respects with reference to her separate property. And some or all of her children were then minors, and therefore incapable of legally contracting in regard to their property. And in such cases it is held the statute will not vest the estate in the cestui que trust, but the estate will vest in the trustee for the cestui que trust. *Perry, Trusts*, (1st Ed.) §§ 310, 311, and authorities cited in note 1 on page 290, and in note 3 on page 291.

We are unable to agree with counsel for appellee that the language employed in this patent created a life-estate in Elizabeth Long, with remainder on or after her death to her children. There is no language creating a particular estate in Elizabeth Long, and that is indispensable to the creation of a remainder. No words are employed showing an intention to covenant life-estate. We agree with them that the word "children," here, is a word of purchase, and not of limitation, but it is to be read conjunctively with the name of Elizabeth Long. The pleadings show that Robert Furniss Long was

the husband, and that Robert Whatkinson Long was the stepson, of Elizabeth Long. The transaction was, therefore, in the nature of a family settlement, in which the present as well as the remote welfare of the children was as much an object of concern as the present and remote welfare of Elizabeth Long. In such cases the rule relied upon by counsel for appellant, as laid down in *Handberry v. Doolittle*, 38 Ill. 206, does not apply. That applies only to cases where a class of persons are to come into immediate possession upon the death of the testator. Here the object and intention is the support of a family, in which after-born children are as much the concern of the donors as those in being. And so it is said: "Whenever the fortune of a married woman is within the jurisdiction of the court, either by having been paid into court, or by a suit concerning its possession, the court always directs an inquiry whether a settlement has been made; and the constant habit is to direct a settlement, not only upon the wife, but upon the children also. The wife cannot say that she claims a settlement for herself, and not for the children. She has the option to have no settlement, but if a settlement is made, it must be upon the wife and children." Perry, *Trusts*, (1st Ed.) § 627. And this includes children, unborn as well as those then in being. 1 Bish. Mar. Wom. § 673. And so a grant to a wife and her child begotten by the grantor has been held to give a joint estate to the wife and a child subsequently born. *Powell v. Powell*, 5 Bush, 619. And so, "if there be a devise or limitation to the use of the children of A., the estate may vest in joint tenancy in one, and afterwards in other children, as they progressively are born." 4 Kent, Comm. (8th Ed.) 376, *359. A conveyance, as here, to the use of a woman and her children, plainly means to her and all of her children,—the right vesting in each child, successively, as born. No other view is consistent with the object and purpose of such a limitation.

It is not pretended, in the view that the legal estate did not vest in the cestui que trust eo instante the execution of the deed, that there is any difficulty in the trustee's holding for the benefit of the unborn child. Hadden was not a purchaser

in good faith, without notice. The only proof in regard to his obtaining title is that Robert Furniss Long and Elizabeth Long conveyed to him, and he immediately went into possession. The rule is thus laid down in Sugden, in his work on Vendors, (8th Amer. Ed.) vol. 2, p. 561: "In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be conversant thereof; for it was grossa negligentia that he sought not after it." Hadden, here, could not make out a title but by the patent, and that, being obtained, would have disclosed the trust, for there is not the slightest pretense that any other title was exhibited as that under which they held. It was by reason of his own gross negligence that he did not know the contents of the patent, if in fact he did not know them; and he could, therefore, only have taken under the deed to him, subject to the trust. But his deed to Dean was clearly color of title, and on Dean's part it was obtained in good faith. And since there was the requisite proof of possession, and payment of taxes thereunder, and the lapse of more than the period of seven years between the time Dean obtained it and the bringing of suit, the law of the statute of limitations is complete as to all the parties except Harry C. Long, who was only 21 years and some odd months old when the suit was brought, and who consequently is within the saving clause of the act.

We are therefore of opinion that neither the errors nor cross-errors are well assigned, and the decree below is affirmed.

SECTION 4.—NOTICE TO AGENT IS NOTICE TO PRINCIPAL.

SNYDER v. PARTRIDGE et al.

138 Ill., 173; 29 N. E. R., 851.

[Supreme Court of Illinois. June 10, 1891.]

Appeal from appellate court, third district.

Bill by Isaac Snyder against John A. Harris, Elizabeth Harris, August Siebold, William C. H. Barton, and Alexander

Partridge. A decree dismissing the bill for want of equity was affirmed by the appellate court. Complainant appeals. Reversed.

Magruder, C. J. This is a bill filed in the circuit court of Tazewell county on August 21, 1885, by Isaac Snyder, the appellant, against John A. Harris and his wife Elizabeth Harris, and Alexander Partridge, William C. H. Barton, and August Siebold. The bill, as originally filed and as subsequently amended, seeks to reform a mortgage or trust-deed by correcting a mistake in the description of the land, and to foreclose the same; and, in case the land intended to be mortgaged has been conveyed to the defendant Siebold without notice on his part of complainant's rights, to require the other defendants to pay the mortgage debt. The bill also prays for other and further relief. Default was entered against Harris and his wife, and the other defendants answered the bill. The court below, after a hearing of the cause at the November term, 1889, upon pleadings and proofs, dismissed the bill for want of equity. This decree of dismissal has been affirmed by the appellate court, and the judgment of the latter court is brought before us for review by appeal.

On June 18, 1873, John A. Harris borrowed \$1,000 of the complainant, Isaac Snyder, giving his note, payable five years after date, with interest at 10 per cent. per annum. At that time Harris owned 80 acres of land, being the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 11, township 26 N., range 4 W., in Tazewell county, and, to secure the note, he and his wife on the same day, executed a trust-deed to John Snyder as trustee, intending thereby to convey the S. $\frac{1}{2}$ of said quarter section. This trust-deed was recorded on June 20, 1873, but, by mutual mistake of both parties, the land mentioned in the trust-deed was described as the "north half" of the N. W. $\frac{1}{4}$ of section 11, instead of the "south half" thereof. Harris had no interest whatever in the N. $\frac{1}{2}$ of the quarter section, which was owned and occupied by other parties. Complainant was not able to read or write, and the attorney upon whom he had relied to draw the trust-deed wrote "north" when he should have written "south." The mistake was not discovered by the

complainant until a few weeks before the present bill was filed. It is not disputed that the mistake in question was made, and that it was mutual, and that it remained unknown to any of the parties interested for many years, and that the intention was to mortgage the S. $\frac{1}{2}$ of the quarter section, which was the land on which Harris lived, and the only land which he owned. Harris has never paid more than about \$50 upon the indebtedness, and at the time of filing the bill was insolvent, and for a long time prior thereto had owned no other property, except such interest as he had in this land. Under these circumstances, there can be no doubt that the complainant as between himself and Harris, would be entitled to have the trust-deed reformed and foreclosed against the land intended to be described.

But by quitclaim deed dated July 1, 1885, acknowledged July 3, 1885, and recorded July 8, 1885, Harris alone, his wife not joining with him, conveyed the north 78 acres of said S. $\frac{1}{2}$ to the defendant Barton. By quitclaim deed dated August 14, 1885, acknowledged August 15, 1885, and recorded August 17, 1885, Barton and wife conveyed the said north 78 acres S. $\frac{1}{2}$ to defendant Siebold; also, for the purpose of conveying the dower of Mrs. Harris, a quitclaim deed conveying said 78 acres to Siebold, bearing date August 14, 1885, and signed by Harris and his wife, was by them acknowledged on August 15, 1885, and recorded August 17, 1885. It will be noted that the deeds to Siebold were recorded four days before the present bill was filed. Neither the deed from Harris to Barton, nor the deeds from Barton and wife and from Harris and wife to Siebold, make any reference to the Snyder mortgage. At the respective dates of the execution of those deeds the record showed no mortgage upon the S. $\frac{1}{2}$ of the quarter section, and it is claimed on behalf of appellees that Barton and Siebold were bona fide purchasers without notice of Snyder's mortgage, or of the mistake in the description therein. The proof shows that Harris received \$1,000 for his conveyance to Barton and that Siebold paid for the deeds to him \$1,550 in cash, and executed to Barton a mortgage dated August 15, 1885, and recorded August 22, 1885, to

secure three notes, two for \$500 each, due in one and two years, and one for \$800, due in three years, all drawing interest at 6 per cent. per annum. The original bill charges that Barton and Siebold had notice, before the execution of the deeds to them, of the existence of complainant's mortgage upon the N. $\frac{1}{2}$ of the quarter section, and of the error in the description, and of the intention of both Harris and Snyder to mortgage the S. $\frac{1}{2}$, and that the deeds to Barton and Siebold were made for the purpose of cheating and defrauding the complainant out of his security, and to place the title beyond his reach. The bill as amended makes Alexander Partridge a defendant, and, in addition to the charges in the original bill, makes the further charges that Partridge knew all about the trust-deed from Harris to Snyder, and the mistake in the description, and that Partridge paid Harris the \$1,000 himself, and conspired with Barton to act as an innocent purchaser, and procured the deed to be executed to Barton instead of himself, and that Barton assisted in the fraud and conveyed the land to Siebold to abet and protect Partridge in the fraud; and that, if the land cannot be reached by bringing home knowledge to Siebold, Barton and Partridge are equitably liable for the amount due upon complainant's note and mortgage, and that Harris is wholly irresponsible, etc.

It is a well-settled doctrine that, in cases of mistake in written instruments, courts of equity will not only interfere as between the original parties, but also as against voluntary grantees and purchasers with notice of the fact. 1 Story, Eq. Jur. § 165, and cases cited in the notes; Wyche v. Greene, 11 Ga. 173; Sickmon v. Wood, 69 Ill. 329; Russell v. Ranson, 76 Ill. 167; Erickson v. Rafferty, 79 Ill. 209; Bent v. Coleman, 89 Ill. 364. We do not think that the evidence establishes notice to Siebold of complainant's equities. There are many circumstances which lead to the suspicion that he may have known of complainant's mortgage and of the mistake therein. But the proof is not clear that Siebold had actual notice or notice of such circumstances as were sufficient to put him upon inquiry. The case is, however, very different with Bar-

ton. The proof in regard to him gives rise to more than mere suspicion. It tends very strongly to show either that Partridge was the real purchaser, and had placed the title in Barton for purposes of concealment, or that Barton had notice of complainant's equities, or of such circumstances as were calculated to put him upon inquiry. Partridge was connected with this whole transaction from beginning to end. He had at one time been in business in the matter of running a ferry with Snyder. He induced Snyder to lend the \$1,000 to Harris in June 1873. \$129.50, borrowed by Harris of Snyder in 1879, was used in part to pay a judgment rendered against Harris and Partridge. Partridge was exceedingly intimate with Barton, and worked for him "quite a while running a mill," and did "sawing" for Barton at his own mill, and bought a mill of Barton, and had many dealings with him, and at one time borrowed \$5,000 of Barton to use in his bridge business. He was also very intimate with Harris. He supposed for years that the Snyder trust-deed rested upon the S. $\frac{1}{2}$ of the quarter section, but he discovered that the trust-deed had been placed by mistake upon the N. $\frac{1}{2}$, long before the conveyance of Harris to Barton. Some of the witnesses testify that Partridge knew of this mistake a number of years before Harris made the deed to Barton. Partridge himself admits that he knew of it in the winter before July, 1885. He tried for a long time to sell the land for Harris, so as to pay off the Snyder mortgage, but says he took no steps to sell it for Harris after he found that the trust-deed was on the wrong land. A number of witnesses testify that Partridge had spoken to them of some business difficulty he had with Snyder, and that they heard him threaten to prevent Snyder from making anything out of his trust-deed. The records show that in 1874 Harris deeded to Partridge and Snyder a strip of land two rods wide, "off of the full length of the south side of" said north-west quarter, "for the purpose of a public road, should one be established to a ferry or bridge across the Illinois river," etc. Hence the deed to Barton only conveyed 78 acres. Harris swears that he sold the land to Partridge; that all he received was \$1,000; that Partridge paid him the money, and that he

knew it was Partridge's money; that he had no negotiations or conversation with Barton until his trade with Partridge was closed; that Partridge requested him to make the conveyance to Barton, giving as a reason that Snyder was aware of his (Partridge's) knowledge of the mortgage, "but that the land could be sold to a third party, who would appear as an innocent purchaser;" that, by previous arrangement, Barton was to go the next day to the office of an attorney named Cameron, and receive the deed; that on the next day the deed was delivered to Barton in Cameron's office. Harris says: "For several years before this sale I had requested Partridge to try to find me a purchaser for the land. He did not do so, but bought it himself." Mr. Cameron, the attorney, confirms the testimony of Harris upon this point. He says: "He (Harris) told me that he had an offer from Alexander Partridge of \$1,000, and afterwards he told me that the deed was to be made to W. C. H. Barton. * * * I told him it made no difference whom he deeded it to, if Partridge directed it. * * * Think I was present when the deed from Harris to Barton was made." Cameron also swears that, the first time Partridge came to see him about it, Partridge told him that he had offered \$1,000 to Harris, and had been instructed by Harris to come and see him (Cameron) about it, and that he (Cameron) tried to induce Partridge to raise his offer, but he refused to do so, and said: "I have offered that, and will give him nothing more, and you had better advise Harris to take it." Partridge and Barton contradict Harris and Cameron on this subject. Partridge is contradicted in material matters by so many witnesses, and his evidence is so full of manifest misstatements, that we give little credit to it. Barton's evidence shows that he knows very little about the transaction. He admits that he had a stroke of apoplexy, and had been in poor health for four or five years before testifying. He does not even know whether he is a party to the present suit or not. He cannot tell how he became informed that Harris would sell the land. He speaks of giving up some notes to Harris when the \$1,000 was paid, but cannot state the exact amount of them; and neither Harris nor Cameron, both of

whom were present, speak of seeing the notes. He says that his memory is poor. He cannot tell where he got the money which he claims to have paid to Harris. He cannot tell how much money Siebold paid him in cash when the latter bought the land. He could not swear that Siebold paid him more than \$500, and thinks that the amount was \$700, whereas Siebold swears, and other proof shows, and it is not denied, that Siebold paid him \$1,500 in cash. On his cross-examination he denies what he said on his direct examination as to Siebold's statements to him.

If Barton bought the land himself, then there are many circumstances which tend to show either that he had notice or was put upon inquiry. The consideration expressed in the quitclaim deed made to him by Harris was \$3,500, when, as matter of fact, he only paid \$1,000. The uncontradicted testimony shows that the land which he was getting for \$1,000 was worth \$4,000. Either before or immediately after he received his deed from Harris, Partridge began to negotiate a transfer to Siebold. Barton says he was provided with an abstract, and had it examined. The taxes of 1884 were a lien on the land on May 1, 1885, and it was the duty of Harris to pay them. Inquiry would have shown that on May 26, 1885, the taxes of 1884 were paid, not by Harris, but by Snyder, at the county collector's office. The records showed that the whole S. $\frac{1}{2}$ of the quarter section, including said 78 acres and the 2 acres transferred to Partridge and Snyder, was sold for the taxes of 1883 on June 20, 1884. Inquiry of Snyder as to the non-payment of his proportion of the taxes on the whole 80 acres may have led to the discovery of Snyder's mortgage. Barton admits that, before he delivered to Siebold the deeds executed by himself and wife and Harris and wife, and before he had received any purchase money from Siebold, he was told by one Hoshor that Snyder claimed to have a mortgage on the land. Hoshor's testimony is to the effect that Barton merely asserted that the abstract of the record did not show any mortgage in favor of Snyder, without denying that he had knowledge of it. Barton knew that Harris had had difficulty with his family, and had separated from his wife, and was

anxious to get his \$1,000 and leave the state. The evidence is also clear that Barton had known the land ever since boyhood, and was acquainted with its value. If he bought the land himself, Partridge was his agent in the matter. The negotiations with Harris and with Cameron were carried on by Partridge, as has already been shown. Partridge obtained the deed from Mrs. Harris and her husband, in order to release the dower claim, as late as August 15, 1885, and paid Mrs. Harris \$50 for signing the deed. He conducted all the negotiations in relation to the transfer of the property to Siebold. If he was acting, not for himself, but as agent for Barton, then his notice of Snyder's mortgage will be regarded as notice to Barton. It is a general rule that, where an agent has acquired information before the commencement of his agency, the principal will not be charged with constructive notice thereof. One reason of the rule is that no man can be supposed always to carry in his mind the recollection of former occurrences. *Hood v. Fahnestock*, 8 Watts, 489. Another reason is that, where the agent is an attorney or counsel, it might be contrary to his duty to reveal the confidential communications of his client. *Id.*; also, *McCormick v. Wheeler*, 36 Ill. 114. But the rule that the knowledge of the agent must be acquired during his agency, and in the course of the same transaction from which the principal's rights and liabilities arise, in order to affect the principle with notice, has no application where it is clear from the evidence that the information obtained by the agent in a former transaction was so precise and definite that it is or must be present to his mind and memory while engaged in the second transaction, (2 Pom. Eq. Jur. § 672, and cases cited in note,) and where the agent is at liberty to communicate his information to the principal, (*Williams v. Tattall*, 29 Ill. 553; *Dunlap v. Wilson*, 32 Ill. 517; *Distilled Spirits*, 11 Wall. 356.) The English rule is that, if the agent at the time of the purchase has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. The supreme court of the United States have approved of the English rule, subject to the qualifications that the knowledge of

the agent is present to his mind at the time of effecting the purchase for his principal, and that the agent is at liberty to communicate his knowledge to his principal, and that it is his duty to do so. *Distilled Spirits*, supra. In the case at bar Partridge was not an attorney, and did not acquire his information while sustaining a confidential relation to anybody. He acquired it from outside parties, and by employing an attorney to examine the records for him. The testimony of Harris, of Cameron, of other witnesses, and his own evidence show clearly that the knowledge of the Snyder mortgage was present to the mind of Partridge during all the negotiations. It follows that, if Partridge bought this property for himself in Barton's name, the purchaser had notice of Snyder's equities. If Barton bought it, he either had constructive notice of Snyder's rights through the knowledge of his agent, or actual knowledge, or knowledge of circumstances sufficient to put him upon inquiry. Under these circumstances, we think that Barton and Partridge are bound to account to Snyder for all the purchase money received from Seibold, and interest thereon, except the \$1,000 or \$1,050 paid by them, or one of them, to Harris, with lawful interest from time of payment; and Seibold is liable with them for such portion of the purchase money as he has paid to either of them, since he was served with process in this suit. This holding is based upon the principles of law hereinafter announced. Where the consideration paid is small in comparison with the real value of the property, and where the circumstances of the case are extremely unfavorable to the fairness of the transaction, though not sufficient to establish absolute fraud, the conveyance will be regarded as a voluntary one, to the extent of the difference between the actual consideration and the real value of the property, and, to that extent, will be treated as fraudulent and void as to existing creditors. *Boyd v. Dunlap*, 1 Johns. 58 Ch. 479; *Keeder v. Murphy*, 43 Iowa 413; *Worthington v. Bullitt*, 6 Md. 172; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. Rep. 74; *Norton v. Norton*, 5 Cush. 524; *Church v. Chapin*, 35 Vt. 223; *Robinson v. Stewart*, 10 N. Y. 189. In the case at bar the proof shows that the property was worth

\$4,000, while Barton and Partridge, either one or both of them, only paid for it \$1,000 or \$1,050. As, however, the sum of \$4,000 is the value as fixed by the opinion of witnesses, we accept \$3,350, the amount of the sale to Siebold, as the value upon the basis of which the defendants should account. Snyder is entitled to have \$2,300 of this sum applied to the payment of his debt.

We are aware that the doctrine, which holds a conveyance for less than the real value to be voluntary so far as the value exceeds the consideration paid, has been ordinarily applied where the creditor seeking to reach the property has obtained a judgment and filed a creditor's bill. But in the present case the court had jurisdiction to correct the trust-deed, and enforce it, as thus corrected, against the S. $\frac{1}{2}$ of the quarter section. Inasmuch, however, as the land cannot be reached, the court will seize hold of the money which the sale of the land has realized. The fund stands in the place of the land, and the lien, which would have attached to the land but for its transfer, will be permitted to attach to the fund produced by the transfer. It is a well-settled principle of law that a mortgage lien will attach to the surplus arising from the sale of the premises under a prior incumbrance. 1 Jones, Mortg. (4th Ed.) § 708; Bartlett v. Gale, 4 Paige, 503. Here the bona fide purchaser, Siebold, has a right to hold the land. His equity is equal with that of Snyder. 1 Story, Eq. Jur. § 165. It may be said, also, that Barton or Partridge may be regarded as having a prior right to hold the sum of \$1,000 or \$1,050 out of the proceeds of sale, to reimburse themselves for what they advanced to Harris. To the extent of the \$1,000 or \$1,050 they are prior lienors or incumbrancers. But as to the surplus of \$2,300 we see no reason why the equitable rights of the appellant cannot attach to it, the same as if he was a subsequent incumbrancer, entitled to the surplus arising from a sale under a prior incumbrance. As to the mortgage for \$429.50 held by Snyder against Harris, and which was never recorded, we find no evidence of notice that is sufficient to bind any of the parties. The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the latter

court for further proceedings in accordance with the views herein expressed.

Rehearing denied.

Roderich v. McMeekin, 204 Ill., 633; *Curron v. Curron*, 216 Ill., 598; *Mack v. McIntosh*, 181 Ill., 633.

SECTION 5.—NOTICE FROM RECORDING

DOOLITTLE v. COOK.

75 Ill., 354.

[Supreme Court of Illinois. September Term, 1874.]

Mr. Chief Justice Walker delivered the opinion of the court:

It appears that Henry I. Chase, prior to and on the first day of January, 1864, owned the N. W. qr., sec. 29, T 11 N., R. 6 E., fourth principal meridian. On that day he sold it to Roger Cook, for \$3,000, of which \$100 was paid in hand, and notes given for annual payments of different sums, running from one to ten years, with ten per cent interest. Chase gave to Cook a bond for a conveyance, on his complying with the terms of the purchase. Cook had occupied the premises for several years prior to his purchase, as a rentor, and after the purchase, continued to occupy it by residing with his family on the same. He made payments as the notes matured, and the interest on the notes not due, until the entire purchase money was paid. He received a deed of conveyance upon paying the purchase money due up to the 1st of January, 1870. The deed bore date the 9th of February in that year, and a mortgage was given back to secure the unpaid purchase money, in accordance with the terms of the bond.

On the 5th day of August, 1868, Chase gave to complainant a promissory note for \$4,000, with ten per cent interest and two other persons signed the note with him. He also, at the same time, to secure the payment of the money named in the note, executed to her a mortgage on the quarter of land which he had previously sold to Cook, and for which the latter held a bond for a conveyance, and on two ten-acre lots in the vicinity of the city of Peoria. This mortgage was recorded on the tenth day of the same month.

Afterwards, on the 6th day of September, 1869, Chase and others executed and delivered to David McCulloch a deed of trust to secure the payment of a promissory note of that date, given to defendant Woodward, for \$13,000, due three years after date, with ten per cent interest. The deed conveyed to McCulloch the two lots previously mortgaged to complainant together with other lots and lands. The deed contained a power to sell and convey, on default in payment. The money having fallen due and not been paid, the trustee sold, under the power in the deed, when defendant Woodward became the purchaser of the two ten-acre lots named in complainant's mortgage, for the sum of \$2,700, and received a conveyance for the same.

On the 7th day of October, 1873, complainant filed her bill to foreclose her mortgage on the quarter of land and the two ten-acre lots, and made Chase, Susan G. Chase, Edwin D. Chase, Cook, Woodward and others, defendants. By the answers filed, and the proofs in the case, the foregoing facts were established. Cook also filed a cross-bill to have the mortgage set aside as to his land, as being void and a cloud thereon.

On a hearing in the court below, a decree was rendered, finding the amount due on the mortgage, ordering the payment of the money by a specified day, and in default thereof, that the two ten-acre lots be sold to satisfy the same. The decree further found, that the mortgage was void as to Cook's quarter, and was a cloud on his title, and ordered it to be canceled, so far as it related thereto. From that decree, complainant prosecutes this writ of error, and asks a reversal of that part of the decree which releases Cook's land from her mortgage. And Woodward assigns cross-errors, and questions the decree, because Cook's land was not required to be first sold.

The important question presented on this record is, as to what interest plaintiff in error acquired in the land purchased by Cook, or in the purchase money he was to pay for the same. Being in the actual occupancy of the premises, according to the numerous and uniform decisions of this court, he was as fully protected in his purchase as if his bond had been

recorded before, and not after, the mortgage. He occupied the same relation to the land and to the parties as if plaintiff in error had been actually notified of the entire facts of the transaction. Then, as between plaintiff in error and Chase, her mortgage became valid and binding on his interest in the premises. But she only acquired a lien on his rights.

But to determine how the rights of Cook became affected we must look to the requirements of the statute as to recording such instruments. The 23d section of the conveyance act of 1845, then, and still in force, only provides for the registration of deeds, mortgages, and other instruments in writing, relating to or affecting lands, and gives them force and effect only from and after they are filed for record, as against all creditors and subsequent purchasers without notice; such instruments are declared to be void as to such creditors and subsequent purchasers without notice, until filed for record. Does Cook fall within the provisions of this statute? He is neither a creditor nor subsequent purchaser to plaintiff in error, but she is a subsequent purchaser to Cook, and with notice, or chargeable with notice. Cook is manifestly not within the statute. He has made no purchase, nor has he, as a purchaser, since plaintiff in error recorded her mortgage, done any act by means of which he should be held liable to plaintiff in error.

We entertain no doubt but, as between themselves, the mortgage bound the interest Chase held in the land. And had plaintiff in error taken an assignment of the notes, or even a delivery of them, her lien would then have been complete. Or it may be, but we do not desire to be understood as so deciding, had she given Cook actual notice of her claim, he might have thereby become liable. But she permitted Chase to hold the notes, and to collect them, until she brought her suit, without even giving Cook any notice. Then, as he was not affected by the recording of the mortgage, nor having had notice, how can it be held that he can be required to pay the money to her which he paid to Chase or to Cockell?

The notes were retained by Chase, and when due and presented for payment, Cook had no legal means of resisting payment. The legal title was in Chase, and had he sued for the

recovery of the money, it would have been no defense to have set up the mortgage on Chase's title to the land. That would not constitute a failure of consideration, either in whole or in part, nor do we see that it could have been successfully set up in any plea.

He was compelled to be eager, prompt and willing to carry out his part of the contract, to be able to enforce the agreement. And he, as he had a right to do, paid the money to the party holding the legal title to the notes, and who could enforce their payment. Even if Cook knew of the mortgage, he was under no legal or moral duty to institute legal proceedings to protect the rights of plaintiff in error. He had not agreed to pay the money to her, nor was he bound to do so, and then litigate with the legal holder of the notes. Plaintiff in error could, at any time, by showing a proper case, have obtained a decree enjoining Cook from paying the money to Chase, and if the time had arrived, have it paid to her.

Plaintiff in error was not entitled to receive the money on the notes until the failure of the payment of the money named in her mortgage. And that did not mature until the 5th of August, 1871. Until condition broken she had no right to enter upon the land; nor till then had she any right to claim the notes or their proceeds. She had not named the notes in her mortgage as being embraced in its provisions. And the notes being presented by the payee or the assignee, he had every right to suppose he had rightful authority to collect them, and as such holder, certainly had, until condition broken. It would be highly inequitable to permit Chase to hold the notes and to collect them of the maker, and then compel the latter to pay the money to the mortgagee of the payee. We, then, have no doubt that Cook was fully protected, under the circumstances disclosed, in all of the payments he made prior to the 5th of August, 1871, when the mortgage fell due.

The question then arises, whether he was protected in paying the last three notes to Cockell. He swears that Chase indorsed the notes falling due after 1869 to him as security for a \$4,500 note due the bank of which he was president, given by Chase, and on which Cockell was surety; that the notes were

indorsed and so delivered in 1869. And Chase swears they were so delivered. In the cases of *Manning v. McClure*, 36 Ill. 490, and *Butters v. Haughwout*, 42 ib. 18, this court held, that a precedent debt was sufficient consideration to protect a creditor in receiving negotiable paper as security for such a debt, if the transaction is bona fide.

Then, in this case, if Cockell, bona fide, and without notice, received these notes as collateral security for the \$4,500 note even if it was a precedent debt, he had a right to hold them free from any and all equities of plaintiff in error. The only question is whether he so received them. There is no pretense that Cockell had any actual notice. Had he examined the records and seen the mortgage of plaintiff in error, it would not have apprised him of the fact that Cook had purchased, or that he had given these notes, or that Chase had given the bond for a deed; nor would any thing it contained have put him on inquiry; nor is there any thing to show that Cockell purchased the notes after the bond for a deed was recorded.

Cockell testified that he purchased the notes in 1868 or 1869, but does not remember the precise time, but is sure that it was before any one of the five notes he received was due, the first of which matured on the 1st of January, 1870. From this evidence it may be safely inferred that the notes were delivered before the 7th of December, 1869, the date on which the bond was recorded. This, then, would make Cockell an innocent purchaser without notice, and should protect him. If then, Cockell was a bona fide holder of these notes, Cook could not resist their payment. The bringing of the suit, or other subsequent notice, could in nowise change his liability to Cockell, nor could it reinstate plaintiff in error in her lien, which she had lost by permitting Chase to negotiate the notes before they were due. It would, if Cockell had no notice, be highly inequitable and unjust to compel Cook to pay the money a second time, when he could not legally resist its first payment, and equally so, if Cockell had no notice to put him on inquiry, to compel him to pay the money when plaintiff in error took no steps to prevent Chase from negotiating this paper. What Cockell's liability might be if he purchased with actual or con-

structive notice of Chase's mortgage, and that the notes were given as purchase money for the land, is not before us, and we shall not determine.

Woodward purchased, chargeable with notice. The mortgage from Chase was recorded when the trust deed was given by him to McCulloch to secure the debt to Woodward. He, then, has no defense against the foreclosure of the mortgage, nor are his cross-errors well assigned, inasmuch as the quarter of land held by Cook is in no event liable to be sold to satisfy the mortgage.

The decree of the court below must be affirmed.

Judgment affirmed.

SECTION 6.—*LIS PENDENS*.

HERRINGTON v. McCOLLUM.

73 Ill., 476.

[Supreme Court of Illinois. September Term, 1874.]

Mr. Justice Scholfield delivered the opinion of the Court.

* * * * *

The court, unquestionably, had jurisdiction of the subject matter of litigation; and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance. The defendants, to avail of the right to question the jurisdiction of the court when the case was reinstated, should either have not appeared at all, or limited their appearance to the objection against the jurisdiction of the court.

The amended answers and cross-bill, filed subsequent to the remanding of the cause, disclosed that, on the 25th day of April, 1863, N. P. Herrington sold the property which he had purchased at the trustee's sale, to John F. Havighorst, and conveyed the same to him by warranty deed, and that, on the 26th day of January, 1864, Havighorst sold the same property to John H. Kramer, and conveyed to him by warranty deed.

Complainant, thereupon, amended his bill, noticing these conveyances, charging that Havighorst and Kramer were purchasers, pending the litigation, and that they had both actual

and constructive notice of his rights, and praying that they be made defendants, etc.

Separate answers were filed by these defendants, each therein averring that he had purchased for a full valuable consideration, paid at the time for the property—that of Havighorst being \$3200 and that of Kramer \$3600—without any notice, actual or constructive, of the rights claimed by the complainant.

The court below held that they were purchasers with notice, and decreed accordingly. The examination we have made of the evidence preserved in the record, has led us to a different conclusion.

Havighorst swears that he purchased the property and paid the consideration therefor, \$3200, in good faith; that before purchasing he examined the records as far as he could, and employed counsel to aid him therein, and became satisfied everything was right; that he took immediate possession of the land after his purchase, paid the taxes thereon and received the rents thereof until he sold to Kramer. When he purchased N. P. Herrington was in possession. When he examined the records, he did not find anything, except that there had been a suit—probably the same suit as the present—which had been dismissed, and that he did not see anything on the docket until two years afterwards, although he had frequent occasion to examine it.

The record shows, that on the 5th day of March, 1863, this order was made in the cause: "This day comes the respondent, by Walker and Dearborn, his sols., and, on their motion, the court doth order, that the complainant's bill herein be dismissed for want of answer to said respondent's cross-bill, heretofore filed in this cause, and to which complainant was required to make answer at the present term of this court; and it is further ordered, that defendant recover of complainant his costs by him in this behalf expended, and that he have execution therefor."

No further order appears in the record and no motion was made in the case until the 13th of March, 1865, when B. F. Prettyman, solicitor for the complainant, filed his affidavit therein, for the purpose of having the order of dismissal set

aside in which he states his reasons for not having given the case more prompt and vigilant attention.

There is also parol evidence, of a negative character, that the case was not upon the docket between the 5th day of March, 1863, and the 13th day of March, 1865.

We have been unable to discover any evidence tending to impeach that given by Havighorst. The circumstances insisted upon by counsel as tending to that result, are: Havighorst was sheriff from 1862 to 1864, circuit clerk from 1864 to 1868, and deputy circuit clerk for two years, at some period, not definitely mentioned, prior to his election as sheriff; that the order of dismissal was improperly entered of record, subsequent to the reversal of the former decree by this court, and that the counsel employed by Havighorst in examining the records was previously employed by N. P. Herrington in defending the case, and therefore had knowledge of complainant's rights, by which knowledge Havighorst must also be affected.

The official positions held by Havighorst afforded him an opportunity to know that the litigation was pending, and what the records showed in relation to it. But his official duties were not concerned with the merits of the litigation, and there is no evidence that he had any information on that subject. It may be said, too, that by being in possession of these offices he had opportunity to mutilate or fabricate records; but the simple fact does not raise a presumption, much less is it conclusive proof that he did mutilate or fabricate record relating to the case.

The evidence to impeach the record showing the dismissal, was not properly admitted. The record imports verity, and can not be contradicted by parol. If the order was improperly entered, application should have been made to the court to correct its record, and, when properly corrected, it would have been conclusive evidence of what had been done by the court. If the question had been, whether what purported to be a record was a record or not, a question proper for the consideration of the court would have been presented; but the existence of a record not being in dispute, all questions relating to the time when it was, in fact, made, on what authority made, and whether its recitals were true or not, should, when it was

offered as an instrument of evidence, having been settled by reference to it alone.

There are two sufficient answers to the suggestion that Havighorst must be held to be affected by the knowledge of his counsel with regard to complainant's rights: 1st. When the bill was dismissed, the suit was legally terminated; and it does not appear that he knew that it would be renewed. 2d. What information he had in regard to complainant's rights, he received while acting as the attorney of N. P. Herrington, and before his employment by Havighorst. The law, as held by this court, is, a party can not be charged with notice of facts within the knowledge of his attorney, of which the latter acquired knowledge while acting as the attorney of another person. *McCormick v. Wheeler et al.* 36 Ill. 116.

Kramer's evidence is, that he purchased the land, in good faith, of Havighorst, on the 26th day of January, 1864, and paid him \$3,600 therefor; that Havighorst was in possession of the land when he bought; that he took immediate possession after his purchase and has ever since been in possession, receiving the rents and paying the taxes on the land; that before he purchased, he procured the county clerk to examine the records in regard to the title, who did so, and reported to him that it was good; that he supposed it was all right, and would not have purchased if he had known there was anything "on the land." No attempt is made to contradict him, or to question his integrity. No suit was pending when he bought, nor for more than one year afterwards.

It can not be said, the doctrine of *lis pendens* is applicable either to Havighorst or Kramer. The law is thus stated in *Freeman on Judgments* § 203: "If a suit were not prosecuted with effect, as, if, at law, it were discontinued or the plaintiff suffered non-suit; or, if, in chancery, the suit were dismissed, for want of prosecution, or for any other cause, not on the merits; or, if, at law or in chancery any suit abated; although in all such cases a new action could be brought, it could not affect a purchaser during the pendency of the first suit." And this is sustained by *Newman v. Chapman*, 2 Rand. 93; *Watson v. Wilson*, 2 Dana. 408; *Herrington v. Herring-*

ton, 27 Mo. 560. Still less could a purchaser, after the dismissal and before the revival of the suit in such cases, be affected. See *Price v. White*, 1 Bailey's Equity, 234; *Blake v. Heyward*, id. 208; *Turner v. Crebill*, 1 Ohio, 373. If the order dismissing the suit had expressed that it was "without prejudice," a different rule might obtain, although even that is questioned by respectable authority, *Clarkson v. Morgan*, 6 B. Monroe, 441; but the record does not present that question, and it is unnecessary to express any opinion on it.

Aside from the entry of the order of dismissal, we are of opinion that complainant was guilty of such laches, in omitting to keep his suit docketed, and prosecuting it continuously, as would preclude him from recovering against Havighorst and Kramer, they being bona fide purchasers and having no actual notice of his rights.

The rule is said to be, that to affect purchasers, there must be a close and continuous prosecution of the suit; the exercise of a reasonable diligence, unaccompanied with any gross slips or irregularities, by which injury could accrue to the rights of third parties. *Preston v. Tubbin*, 1 Verm. 286; *Clarkson v. Morgan*, supra; *Watson v. Wilson*, supra; *Gibler v. Trimble*, 14 Ohio, 323; *Trimble v. Boothby*, id. 109; *Ehrman v. Kendrick*, 1 Metcalf (Ky.) 146.

If to permit a case to remain off docket for two entire years during four regular terms of court, without making any effort to reinstate it, and having a hearing, can be called the exercise of reasonable diligence, or, indeed, any degree of diligence whatever, it would be difficult to determine what might be regarded as laches in the prosecution of a suit.

Entertaining these views, we can but hold that it was erroneous to decree a sale of the lands for the payment of the claim of complainant. Kramer is entitled to hold them, disencumbered of any lien on account of the deed of trust executed by the Hickmans to Blanchard as trustee, there being no vital irregularity appearing of record in regard to the sale and conveyance by Blanchard to Herrington.

The decree is reversed and the cause remanded.

Decree reversed.

CHAPTER V.

BONA FIDE PURCHASER.

ROSEMAN v. MILLER
84 Ill., 297.

[Supreme Court of Illinois. September Term, 1876.]

Mr. Justice Scholfield delivered the opinion of the Court:

The present appeal is prosecuted to reverse a decree of the court below allowing the complainant to redeem from a sheriff's sale, and setting aside certain deeds and enjoining the prosecution of a suit in ejectment.

The only question made is, whether the evidence in the record is sufficient to sustain the decree.

At the June term, 1869, of the Superior Court of Chicago, one Lake obtained a judgment against the complainant for \$1735.45, and costs of suit. Execution was thereupon issued to the sheriff of Grundy county, and by him levied upon the east half of the south-east quarter, and the east half of the south-west quarter, of section 16, township 33, range 7, in that county. On the 19th day of February, 1870, the lands were struck off and sold by the sheriff, en masse, to the defendant Roseman, for \$10, and, there being no redemption from the sale, the sheriff executed and delivered to him a deed therefor, on the 24th day of May, 1871. On the 26th day of October, 1871, Roseman conveyed, by quit claim deed, an equal undivided half of the land to the defendant Beach.

The two tracts of land, as is apparent by reference to the description, do not adjoin each other, there being another 80-acre tract between them. The evidence shows that there is a house, barn, orchard, etc., on each tract, and they constitute two wholly separate and independent farms. They were worth, in the aggregate, at the time of the sale, a sum varying, in the opinions of different witnesses, from \$6000 to some-

thing over \$8000; but they were incumbered by a mortgage, the balance on which was \$1889.86.

The policy of selling *en masse*, as was here done, separate and wholly independent tracts of land, neither of which has any apparent tendency to augment the value of the other, when taken together, is liable to produce great injustice; and, notwithstanding they may have been previously offered separately without obtaining bidders, where the amount bid for them *en masse* is merely nominal, the officer should, ordinarily, postpone the sale and re-advertise. Ten dollars, when compared with the value of the property to be sold, even after making due allowance for the depreciation in value in consequence of the mortgage lien, was purely a nominal bid, and no one making it could reasonably anticipate that he was, therefore, to become the owner of the property. In cases of such gross inadequacy between the value of the property and the amount bid, as was observed in *Hamilton v. Quimby et al.* 46 Ill. 96, the court will seize upon any circumstances of unfairness toward the debtor, to afford him relief.

The defendant Beach, in our opinion, has shown no equity in his favor which places his title upon a better footing than that of the defendant Roseman. Although he may have been a purchaser without notice, yet, if he took the deed as a volunteer, or has not paid the purchase money, he is not an innocent purchaser for value, and can not be protected. It was incumbent on him to prove that he was a purchaser for value, and had paid the purchase money, and this, too, independently of the recitals in the deed; and not having done so, there is no presumption to aid him. *Brown v. Welch*, 18 Ill. 343; *Hamilton v. Quimby*, *supra*.

The case made by the evidence for the complainant is, that he was induced to believe, and did believe, that the sale to Roseman was not consummated, and would be canceled on his paying the amount due on the judgment. This is, in substance, the evidence of his father, who was acting as his agent in the matter. Subsequent to the sale, this witness says he paid the sheriff on the judgment \$444, and, in conversation with the sheriff, he was informed that Roseman had paid

nothing on his purchase; that the sale amounted to nothing, and that he would cancel it upon full payment of the execution. He is contradicted, in some respects, by the evidence of the sheriff, but we think he is borne out by other circumstances. If he had not supposed the sale informal and of no validity, why not out of the \$444, appropriate enough to redeem from it? This would have been most natural. The judgment was bearing but six per cent interest, but if there was a sale, the amount of the bid was bearing ten per cent. Nothing could be gained by leaving this amount to stand, and appropriating all the payments on the balance of the judgment. He says he had paid the sheriff his costs accrued prior to the sale, and the sheriff also received \$14 out of this payment of \$444, on account of his costs. The sheriff, neither in this nor in subsequent accounting on the receipt of money on the judgment, before the execution of the deed to Roseman, took any account of the bid of Roseman; and, although he gave Roseman a certificate of purchase, it does not appear that any return of the sale was indorsed on the execution or venditioni exponas; for this witness swears that he had the clerk of the court whence they were issued, to examine, and he reported no return could be found. Although complainant has fully paid the amount of the judgment on which the sale was made, he has never received any credit on account of Roseman's purchase. The witness is positive that he paid the sheriff, in all, \$49, for costs, which the sheriff assured him covered the costs of advertising, sale of property, and return of execution. If the sale was bona fide, and the money paid at the time, it was the duty of the sheriff to have rendered an account of it. His return should have shown the fact; and that no return is introduced to support him, we regard as greatly weakening his evidence.

Roseman was a constable, and, prior to the sale, had acted as bailiff to the court, and, in one instance, as deputy sheriff, and shortly subsequent to the sale, he was regularly appointed as the deputy of the sheriff. His association with the sheriff was such as to tend very strongly to show that, if he did not actually occupy, at the time of the sale, a position which,

under the law, rendered him ineligible to purchase at all, he must have known of the conduct of the sheriff in this matter, and, knowing, he is affected by it.

When Roseman bid, we can not regard, from the mere nominal amount of his bid, that he was in good faith expecting and intending to become the purchaser of the land. Before he took a deed, he was requested to call at complainant's office, at a subsequent day, for his money. He did not then notify the complainant that he claimed the property, but, by his silence, gave him to believe he would accept the money. There is, moreover, some evidence tending to show that his motives were rather to avail of an unconscionable advantage to extort money, than to insist upon a bona fide legal right, in obtaining the deed.

In what we have said, we have followed the view supported by the evidence of the complainant, because, after mature consideration of all the evidence, we are unable to say the court below erred in accepting that view; and we have not deemed it advisable to lengthen our opinion by quoting the evidence in full.

Our conclusion is, the decree below works no injustice. It gives to Roseman all to which he is, in good conscience, entitled; and it does not appear that Beach has been deprived thereby of money he has paid in good faith.

The copy of the execution in the record is without a seal. On this ground alone, the sale might have been declared a nullity, and no redemption been necessary. But we have chosen to place our affirmance upon other grounds, thinking the omission of the seal may have been through carelessness of the copying clerk, and not because there was none in fact.

The decree is affirmed.

Decree affirmed.

BALDWIN v. SAGER.

70 Ill., 503.

[Supreme Court of Illinois. September Term, 1873.]

Mr. Justice Walker delivered the opinion of the Court:

In March, 1872, appellee filed his bill to establish a mortgage, which had been executed by A. G. Morey and wife to Daniel Sager, on certain real estate owned by the Chicago City Railway Company, or that Baldwin should pay the balance due complainant as a pledgee of the mortgage.

It appears that, in August, 1867, one George A. S. Crooker owned the premises in question, and, at that time, executed a trust deed to George R. Clarke, to secure two promissory notes for \$1333.32, which were payable to T. S. Dobbins. This deed was recorded December 19, 1867. By several mesne conveyances, the title of Crooker passed, subject to this mortgage, to Albert G. Morey, by a deed from Marcus Walker, dated the 20th of January, 1869, which was recorded the 3d of February, 1869, and Morey assumed the payment of the notes secured by the trust deed to Clarke.

On the 1st of February, 1869, Morey executed a mortgage to Daniel Sager, for \$4000, which was afterwards assigned to complainant, and by him to appellant Baldwin, by a deed absolute in form, which was duly recorded; and on the 8th day of October, 1870, Morey conveyed the equity of redemption to Baldwin, and that deed was recorded on the same day. On the 15th day of the same month, Clarke sold the premises, under the power in the trust deed, to Baldwin. In December following, Baldwin conveyed to the railway company, by a deed delivered at that time, but bearing date in the previous October.

From these facts, it appeared that Baldwin was the holder of the legal title, absolute and free from these various mortgages. Such was the record, and such the apparent title upon which all persons not being charged with other notice could most assuredly rely; but it was claimed in the court below, and it so held, that Sager had, in fact, only pledged the lien he held, as second mortgagee, to Baldwin, to secure a debt the latter held against the former; that the deed by which

he assigned it, although absolute on its face, was, in fact, only transferred as a pledge to secure the payment of \$2000 he had borrowed of Baldwin, and that neither the sale by Clarke, under the prior deed of trust, to Baldwin, nor his sale to the railway company, deprived him of his right to enforce payment of the Morey mortgage; and the court below decreed that the Morey mortgage was not satisfied, but was a subsisting lien on the premises, and ordered the payment of \$2214.53 in twenty days, and if not paid, that the master sell the premises.

We have been referred to no evidence, nor have we found any in the record, that the railway company had any other notice than such as the record discloses; and there can not be the slightest doubt that, if the company had paid all instead of but one-half of the purchase money before this bill was filed, they would hold the title, free from all incumbrances; but it is urged, that, inasmuch as the purchase money was not all paid, they hold subject to any lien that is disclosed by complainant's bill, and on this question, we are referred to the cases of *Brown v. Welch*, 18 Ill. 343, and *Mosier v. Knox College*, 32 Ill. 155. In the former of these cases, it was said that a subsequent purchaser must have received a deed and paid the purchase money before he receives notice, to be entitled to protection as a bona fide purchaser; but it will be observed that the answer of that case did not set up or claim that any portion of the purchase money had been paid. In such a case, there can be no question as to the rule contended for, as, to postpone such a purchaser to a prior equity could not injure him in the slightest degree. The prior equity in such a case can be enforced without doing any wrong to the subsequent purchaser, as, if he remove the incumbrance, he may set up the amount paid against the payment of so much of the purchase money, or he may rescind the contract and avoid the payment.

In the latter of these cases, the subsequent purchaser took with notice from the record, and, although he executed his note for the purchase money, it was with notice, and there was no right to invoke the protection of a court of equity.

He purchased and gave his note in his own folly, unless he expected to redeem from the prior mortgage; but in this case, the railway company, before there can be any pretense of notice to them of appellee's claim, had received a deed of conveyance for the premises; had paid \$2860, being one half of the purchase money, and had given their negotiable notes for the balance. This, then, presents a different case from either of those to which reference has been made.

The question is, shall appellee be permitted to make a transfer of his mortgage, absolute and unconditional in form, which is recorded and relied upon by a purchaser, as extinguishing his claim and lien upon the land—be permitted to subsequently set up a secret understanding that his transfer was only a pledge—and thus deprive the purchaser of his payment on the purchase? And may he thus assert his rights, against the purchaser, for the balance, although he may have given his negotiable notes, which may have been assigned, and the purchaser be compelled to pay them, and thus lose both the purchase money and the land? The English cases seem to hold that he may, but in this country the current of the authorities does not hold the rule in so broad a sense. The doctrine seems to be well settled that, although the purchase money may not be paid at the time the vendee receives a conveyance, still it will be sufficient if it be paid before notice. *Warner v. Winslow*, 1 Sanfd. Ch. 430. But it has been repeatedly held that payment of a part of the purchase money, although not sufficient to invest the purchaser with the character of a bona fide purchaser as regards the estate purchased, does give him the right to invoke the aid of the equitable principle, that he who claims equity must do equity, and require reimbursement, from the rightful owner, of all moneys paid before notice, as a condition to granting the first purchaser or incumbrancer relief. *Yost v. Martin*, 3 Serg. & R. 423; *Bellas v. McCarthy*, 10 Watts, 67; *Juvenal v. Jackson*, 2 Harris, 519; *Urich v. Beck*, ib. 636; 4 ib. 499. The same court also holds that the expenditure of money on the premises, in their improvement by the purchaser, when no portion of the purchase money has been paid, if done before notice,

entitles the vendee to the same rights. *Boggs v. Varner*, 6 W. & S. 469. And it seems that protection will be given, in some form, for all payments and improvements made before notice, although payment in full may be required to constitute a good bar by plea to the bill. *Farmers' Loan and Trust Company v. Maltby*, 8 Paige, 361; *Everts v. Agnes*, 4 Wiscon. 343; *Flagg v. Mann*, 2 Sumn. 486. Notes or bills on third persons, paid, are equivalent, in most cases, to actual payment.

In the case of *Freeman v. Deming*, 3 Sandf. Ch. 327, it was held that where notes are given by the purchaser and they are negotiated before notice so as to render the vendee liable at all events that it will be treated as a payment. Whilst cases are found, in the courts of this country, which hold that, unless all the purchase money is paid before notice, equity will not afford any protection, we think the former cases announce a rule more consonant with the principles of equity. Why should a person execute a deed apparently absolute, and thus induce others, on the faith of the deed, to purchase, pay a portion of the money, and then come in and claim a secret lien or trust in the premises, and override his claim, and leave the purchaser to get his money back as best he can? This rule was applied in the case of *Roberts v. Opp*. 56 Ill. 34. In that case, the complainant, although held to have an interest in the land, was required to take her interest in the unpaid notes given for the purchase money, and not her share in the land, although a trust was established in the vendor, and the vendee had not paid the purchase money.

Had it appeared that the notes given by the railway company had been actually negotiated before notice, then we should have been inclined to hold that appellee would have been precluded from asserting any claim to a lien on the land. In such a case, his only remedy would have been against Baldwin individually.

It is, however, insisted, that the evidence fails to establish any lien in favor of appellee. It is not contested that the assignment of the mortgage on Morey to Baldwin was more than a security for the payment of \$2000, loaned by the lat-

ter to appellee. It, then, devolved upon Baldwin to show that it subsequently became absolute, in fact as well as in form. This he attempted to do by evidence that appellee wrote him, before the sale, if he would surrender his note, that he would give up the Morey mortgage, and he could make his money out of the land; and Baldwin claims that he sent his note, in compliance with this request; but appellee denies this in the most emphatic terms. On this question, the evidence is irreconcilably conflicting; but the court below held that Baldwin had failed to show this fact, and, after a careful examination of the testimony, we are not prepared to hold that he erred. It is true, that the question is not free from doubt, but that doubt should incline the chancellor to disallow the defense. Baldwin, to recover, was bound to establish this defense by a preponderance of evidence, and we are unable to say that he has. It is true, that the destruction of the letter and other papers by the fire of the 9th of October, 1871, has rendered it more difficult to make such proof, but that is his misfortune, and we are unable to violate the rules of evidence to relieve against its effects.

Inasmuch as appellee invested Baldwin with apparent absolute title, and the railroad company became the purchasers without notice, and had paid half of the purchase money, and received a deed for the land before notice, they should not be disturbed in that purchase, if appellee can otherwise obtain his rights. It is not disputed that the railroad company contracted to pay the full value of the land, and hence, that sale should not be disturbed.

Out of the proceeds of that sale, Baldwin should be permitted to retain, first, the amount due on the Dobbins notes; next, the amount due on the \$2000 due him for money loaned appellee; and then the remainder of the Morey mortgage, after deducting therefrom the amount due Baldwin on his loans to appellee, should be paid out of the balance of the purchase money due from the railroad company, if there shall be a sufficient sum therefor, and if more than enough, then the balance be retained by Baldwin. This disposition of the fund proceeds upon the ground that Baldwin has not trans-

ferred the notes of the railroad company to a bona fide purchaser. If, however, he has, then the decree should be against him personally for appellee's portion of the purchase money owing by the railroad company.

The decree of the court below is reversed and the cause remanded.

Decree reversed.

CHAPTER VI.

PRIORITIES.

SECTION 1.—UNEQUAL EQUITIES.

KNOBLOCH v. MUELER.

123 Ill., 554; 17 N. E. R., 696.

[Supreme Court of Illinois. January 20, 1888.]

Shope, J., (after stating the facts as above.) The bill in this case seeks to remove, as a cloud upon the title of appellee, Solomon Mueller, derived under the will of 1855, the deed of Catharine and Emil Rebhau to appellant; and restrain by injunction the prosecution of an action of ejectment brought by appellant to recover the land partitioned to Catharine Rebhau in the proceedings instituted by her for partition of the lands of which her father died seized, and to enjoin a certain trespass suit brought for alleged trespasses upon said land by appellee, and to restrain Mrs. Rebhau from collecting \$1,638.97, decreed as rents and profits in said partition proceeding. Mrs. Rebhau not having appealed from the decree against her, the latter branch of the case made by the bill is not before us. When the instrument dated March 14, 1870, purporting to be the last will and testament of George C. Mueller, who died March 20, 1870, was set aside upon bill filed for that purpose, it was supposed by all the parties in interest that his estate had descended to his heirs at law as intestate estate, and letters of administration were granted accordingly. All the parties acquiesced in this condition of affairs, and rested in the belief that the property had so descended until the discovery, in March or April, 1883, 13 years after the death of the ancestor, of the will of the 9th of March, 1855, by which the estate in question was devised to George and Solomon Mueller. The good faith of the parties is not questioned, no fraud or misconduct is alleged, or laches imputed

or imputable to any one, on account of the delay in the production of this will, or in any of the proceedings had in respect to the real or personal estate prior to its discovery. When Catharine Rebhau, daughter and one of the heirs at law of said George C. Mueller, deceased, on the 22d day of March, 1879, filed her bill for partition of the real estate of which said George C. had died seized; and when Solomon Mueller filed his answer, admitting the intestacy of his father and consenting to the partition to Mrs. Rebhau and Mrs. Rhinehardt, his sisters, each a one-fourth part or interest in the land of which their common ancestor died seized, and consented to the decree therefor, the several parties in good faith believed the facts alleged in her bill to be true, and that the land had descended to the four children of George C. Mueller, deceased, in equal parts in fee. It is also equally clear that when appellant, Thomas Knobloch, purchased the interest of Catharine Rebhau in said land, and paid her therefor \$5,050, that he did so in good faith, relying upon the title of said Catharine as found and declared by the circuit court of St. Clair county in said partition proceeding by the consent of appellee. Upon the production and probate of the will of 1855, in April, 1883, it became manifest that the title to said land had not in fact so descended to the heirs at law of said George Christian Mueller; but by virtue of that will the legal title thereto, at the death of the testator, vested in the devisees, George and Solomon Mueller, and that by the last will of said George Mueller, who died February 29, 1875, the legal title to the whole of said land became vested in appellee, Solomon Mueller. It is apparent that all parties, while acting in good faith, were mistaken, and that the decree of the circuit court, finding one-fourth interest of said land in fee in Catharine Rebhau, would not have been entered had the court or parties been aware of the true condition of the title to the land.

It is undoubtedly true that, as between the parties and those chargeable with notice, courts of equity will entertain jurisdiction and grant relief, on proper bill filed, from the injurious effects of admissions and confessions of material facts, made in course of judicial proceedings, in ignorance of the rights

of the party making them, where he has been guilty of no negligence, either in the discovery of the fact, or in applying to the proper forum for relief; but such relief can only be granted upon such grounds and for such reasons as would authorize the court to set aside agreements or contracts entered into by the parties. *Attorney General v. Tomline*, 7 Ch. Div. 388; *Millspaugh v. McBride*, 7 Paige, 509; *Furnival v. Bogle*, 4 Russ. 142; *The Hiram*, 1 Wheat. 440. But it is apparent that the decree in the partition proceedings can only be attacked, reversed, annulled, or set aside by direct proceedings in that case, or upon bill of review, or bill in the nature of a bill of review.

If this were not so, however, there is another ground upon which the decree must be reversed. It is a well-settled doctrine of this court that no relief will be granted in equity, in cases of this sort, injuriously affecting intervening rights acquired in good faith, after the rendition of a judgment or decree, and in reliance thereon. So it has been held that amendments may be made in judicial proceedings, but not so as to affect the intervening rights of third persons accruing prior to such amendment. *Shirley v. Phillips*, 17 Ill. 473; *Coughran v. Gutcheus*, 18 Ill. 390; *Sickmon v. Wood*, 69 Ill. 329; 1 Story, Eq. Jur. 165. Relief will not be granted to the prejudice of appellant, if he has an equal equity with appellee, and is equally entitled to the protection of the court. 1 Story, Eq. Jur. 165. As already seen, all the parties to the partition proceedings supposed in good faith that Mrs. Rebhau was the owner in fee of the undivided one-fourth of the lands of which her father died seized, and that on the 8th day of March, 1881, appellant purchased her interest in such lands for a full and adequate consideration, without notice, actual or constructive, of any defect in her title, and in good faith. All the elements to constitute him a bona fide purchaser are present; that is, a valuable consideration paid, absence of notice, and presence of good faith. 2 Pom. Eq. Jur. § 745. His grantor had, by a court of competent jurisdiction, in a proceeding instituted to find and declare her interests in these lands, been adjudged, by the consent and admission of appellee, to be the owner in fee

of the undivided one-fourth part thereof, and there was nothing in the record or elsewhere apparent to disclose that she, who was thus clothed with apparent legal title, was not the owner in fact of that interest in the land. Nor is it shown or claimed that further inquiry would then have disclosed anything to cast suspicion upon her title. The defense of a bona fide purchaser had its rise in equity, upon the doctrine that a court of equity acts upon the conscience of him against whom relief is sought; and if he has done no wrong, or it would be unconscientious or inequitable to grant the relief, the court will refuse to exercise its jurisdiction. If, in equity and good conscience, the complainant should not obtain what he seeks, or the defendant ought not to suffer what is demanded, then the court will withhold its power. In theory, it is said, the defense of a bona fide purchaser presupposes some defect in purchaser's title; but the court refuses to investigate the validity of the title of either party, upon the ground that good conscience does not dictate that he who has dealt honestly, in good faith, and without notice, should be deprived of the legal right he has thereby gained. *Id.* § 739. There was formerly much apparent conflict in the adjudged cases as to when the defense of a bona fide purchaser would be availing. In *Phillips v. Phillips*, 4 De Gex, F. & J. 208, Lord Westbury grouped the cases in which a bona fide purchaser will be protected into three general classes, and reduced the doctrine to a formula, which it is said by Pomeroy, (2 Eq. Jur. § 742,) has been accepted, by subsequent judges almost without exception. The doctrine thus formulated, so far as applicable here, is: "Thirdly, when there are circumstances which give rise to an equity, as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere."

Without extended discussion, it is apparent that the bill here filed seeks relief ancillary to the legal state of appellee. The purpose of the bills is to remove the deed to appellant as a cloud upon appellee's legal title, and to enjoin the assertion of rights

by appellant thereunder. The right to the relief sought exists, if at all, upon the equity arising out of the alleged mistake as to the title to said land in the grantor of appellant. This brings the case directly within the rule above given, which is sustained by the weight of modern authority; and, if appellant has made out his defense as bona fide purchaser, he should have prevailed in the court below. The decree of partition, as seen, was rendered by a court of competent jurisdiction, having jurisdiction of the person and of the subject-matter, and by appellee's consent. Appellant without notice, for full value, and in perfect good faith, acquired the title, sought to be removed as a cloud upon appellee's title, from the party found and declared by that decree to be owner, and we can perceive no principle upon which a court of conscience can hold that appellant shall lose in consequence of the mutual mistake, rather than appellee. It cannot be said that the equities of appellee are superior to those of appellant in respect to the title thus acquired, and, the equities being equal, the court will give no assistance to the legal title, (2 Pom. Eq. Jur. § 742, and cases cited,) but will remit the complainant to his remedy at law.

It is said, however, that, at the time appellant purchased, the report of the commissioner had not been confirmed by the court, and that he purchased subject to having the interest of his grantor, as found by the commissioners, set aside. It is true that exceptions to the report of the commissioner were then pending, but none of the exceptions questioned the right or title of Catharine Rebhau to the undivided one-fourth part of the real estate of which her father died seized. Such exception related simply to the manner of partition, and the conduct of the commissioners in making the same. There was nothing therein to put appellant upon notice or inquiry as to the title of Mrs. Rebhau. He bought subject, as a matter of course, to having the amount set off to Mrs. Rebhau changed or diminished by subsequent action of the commissioners, or to have their report set aside by the court; but his purchase was of her interest in the land, which was conceded by appellant and declared by the court to be a one-fourth interest therein.

It is also said by counsel for appellee that appellant may rely upon the covenants of warranty in his deed from the Rebhaus, and therefore the equities are with appellee. It is not shown whether Mrs. Rebhaus, and her husband, who joined in the execution of said deed, are solvent or insolvent, and we perceive no principle, nor is any suggested by counsel, upon which appellant should be driven to resort to his legal remedy against his grantor for indemnity from loss, especially in view of the fact that it is not shown that such remedy would be availing. It will not be proper for us to here discuss or determine the right of appellee to the money paid by appellant for the land in question, or as to whether he has any remedy in respect of the same.

We are of opinion that the defense of a bona fide purchaser has been maintained, and, upon both of the grounds indicated, the right of appellee to the relief sought should have been denied, as against appellant, Knobloch, and the bill dismissed as to him. For the error of the court in this regard, the decree, in so far as it affects the appellant, Knobloch will be reversed and the cause remanded to the circuit court of St. Clair county, with instructions to enter a decree in conformity with this opinion, dismissing the bill as to said appellant.

SECTION 2.—EQUAL EQUITIES.

PEOPLES BANK v. GRIDLEY.

91 Ill., 457.

[Supreme Court of Illinois. January Term, 1879.]

Mr. Justice Scholfield delivered the opinion of the Court:

This case comes before us by appeal from the Appellate Court of the Third District.

The facts are: The fourth section of the charter of the Bloomington and Normal Horse Railway Company provides that the capital stock of that company "shall be divided into shares of \$100 each, and shall be issued and transferred in such manner and upon such conditions as the board of directors may direct." And the sixth section provides, that "The said

corporation, by its board of directors, shall have power to make, ordain and establish all such by-laws, rules and regulations as said directors shall deem needful and expedient to carry into effect the purposes of this act, and for the well ordering, regulation and management of the affairs, business and interests of said corporation: Provided, the same be not repugnant to this act, or to the laws or constitution of the State or the United States."

Under the authority of these provisions, on the 28th of March, 1867, the board of directors of that company adopted the following by-law: "The transfer of stock shall only be made upon the books of the secretary, on the presentation of the stock certificates properly indorsed."

In the summer of 1867, William A. Pennell became the owner of 100 shares of stock in that company, and ten certificates, each representing ten shares of stock of the par value of \$1000, were issued to him. In the body of each certificate was this language: "Subject to the by-laws of said company—transferable only on the books of the company, on the surrender of this certificate."

On the 10th of November, 1873, Pennell and the Ruttan Heating and Ventilating Company being indebted to the appellant for \$7400, borrowed money, Pennell assigned and delivered these certificates of stock to the appellant to secure that indebtedness, and also to procure subsequent advances to be made. The appellant has since held possession of the certificates, but no transfer of the stock of which they evidence ownership has been made on the books of the company. Of the indebtedness existing when they were assigned and delivered, there remains due \$2650; and there has also been advanced \$1400 since, which remains due and unpaid.

On the 7th of May, 1877, in vacation of the McLean circuit court, the appellees, Asahel and Edward B. Gridley, as "A Gridley & Son," recovered a judgment, by confession, against William A. Pennell and others for \$1000, and costs of suit. On the same day execution was issued on the judgment, and the sheriff of McLean county, by virtue thereof, levied upon Pennell's shares of stock in the horse railway com-

pany, making his levy in conformity with the directions of the statute relating to levies of that description.

The appellees, Asahel and Edward B. Gridley, and the horse railway company had no actual notice that the certificates of stock had been assigned and delivered to appellant until after the levy of the execution.

The Appellate Court held that, the stock not having been transferred on the books of the horse railway company before the levy was made, the levy is entitled to priority over any claim in behalf of appellant, and this ruling presents the only question to be now determined.

Appellant insists that *Kellogg v. Stockwell et al.* 75 Ill. 68, settles that the ruling below was erroneous. That was a bill in equity to protect the original owner of corporate stock from assessments made by the corporation after he had sold his stock, filed by such owner against his vendee. There had been no transfer of the stock upon the books of the corporation, and there was a clause in the charter providing that shares of stock should be transferable only on the books of the corporation. It was said that this provision in the charter was designed for the protection of the company, and, perhaps, a purchaser without notice; but, it was held, as between the vendor and vendee, a sale and transfer will be good without being entered upon the company's books, and will be enforced in equity, and a decree requiring the vendee of the stock to pay or indemnify the vendor, on account of the assessments, was affirmed.

But there is no question, here, between vendor and vendee, or pledgor and pledgee. The question is between two parties having equally meritorious claims against the original owner of the stock, each claiming a prior lien over the other,—the one by virtue of the pledge, the other by virtue of the levy of the execution. * * *

It is too obvious to justify extended comment, that these provisions contemplate that, as against a judgment creditor, title to the stock can only pass by transfer on the books of the company, for if it might be otherwise transferred, as, by indorsement and delivery of the certificates alone, these provisions could have no practical operation.

If the mere transfer of the certificate, under contract of sale, shall sufficiently pass title, of what worth can the certificate required by § 55 be?

How can a certificate of shares purchased on execution, as provided by § 56, be of any avail, if the original certificate be out and be transferable from hand to hand, by indorsement and delivery?

Unless the books of the company is the proper place to ascertain the title of the purchaser or assignee of stock, what possible end can be subserved by requiring a copy of the execution to be left with the clerk, treasurer or cashier of the company, etc., and with what sense could it be said this should be regarded as a seizure of the stock on execution, etc.?

What we regard as the correct doctrine is well stated by the late Judge Redfield in his note to *Fisher et al. v. President, directors, etc., of the Essex Bank*, 1 Am. Railway cases, 127. He says: "It seems to be agreed, upon all hands, that in the case of a mere pledge of shares for the security of a debt, a formal delivery will be required to create or to consummate the contract, since it is of the very essence of a pledge that the possession be transferred to the pledgee; for as the general title of the thing still remains in the pledgor, unless the possession were transferred, there would be nothing to uphold the contract. Redfield on Bailm. §§ 659-674, and cases cited. This may be effected by a formal or even a blank indorsement or assignment of the certificate, and delivery of the same to the assignee. Nothing more is ordinarily required to complete the contract as between the immediate parties. But, as to third parties, something more is commonly required. Some such visible or ascertainable index of the change of ownership as will naturally put those interested in the question upon inquiry, and thus lead them to correct information upon the subject, must exist. 1 Story Eq. Jur. § 421 b, and cases cited in note. Some of the American States have attempted to maintain a different rule, as, that the assignment, being complete between the parties, will be held good as to third parties whose rights are subsequently acquired and perfected by actual possession, without knowledge of the prior transfer. *Muir v.*

Schenck, 3 Hill (N. Y.), 228, and cases cited by Cowen, J., in the opinion of the court. But this rule has never obtained in England, and only to a very limited extent in this country, and is repudiated by all the best authorities. 1 Story Eq. Jur. § 412 c, and cases cited. But we think there can be no fair question that where the law of the State, as applicable to corporations, whether it be by a provision in the charter of the particular company or by general statute, or settled course of decisions in the courts, requires that shares shall be transferred in a particular mode, as, in the present case, that they shall be 'transferable only at its banking house and on its books,' there must be a substantial compliance with the requirement, in order to protect the property against future assignments or levies."

These views are sustained by *Fisher et al. v. President, etc., of the Essex Bank*, 5 Gray, 373; *Sabin v. Bank of Woodstock*, 21 Vt. 353; *Oxford Turnpike v. Bunnell*, 6 Conn. 558; *Pinkerton v. Manchester and Lawrence Railroad Co.* 42 N. H. 424; *Pittsburg and Connellsville Railroad Co. v. Clarke*, 29 Penn. St. 146; *Dutton v. Connecticut Bank*, 13 Conn. 498; *Skowhegan Bank v. Cutter*, 49 Maine, 315; *Lockwood v. Mechanics' National Bank*, 9 R. I. 308; *Agricultural Bank v. Burr*, 24 Maine, 256; *Blanchard v. Dedham Gas Co.* 12 Gray, 213. And in *People ex rel. Devin et al.* 17 Ill. 86, this court, by implication, indorses the doctrine.

No point is made, nor is any tenable, that the resolution of the board of directors, and not the express declaration of the charter, prohibits a transfer of stock otherwise than on the books of the company. The board of directors were expressly empowered, by the charter, to provide for the mode of transfer, and that was all that was necessary. *Lockwood v. Mechanics' National Bank*, *supra*.

The cases in New York and New Jersey, relied upon by counsel for appellant, recognizing a doctrine not in harmony with that above indorsed, do not commend themselves to our approval. The judgment of the Appellate Court is affirmed. Judgment affirmed.

See however, *Rici v. Gilbert*, 173 Ill., 348-353; *Magerstart v. Schaefer*, 213 Ill., 351.

CHAPTER VII.

PENALTY OF LIQUIDATED DAMAGES.

HARPER v. TIDHOLM.
155 Ill., 370; 40 N. E. R., 575.

[Supreme Court of Illinois. April 1, 1895.]

Carter, J. (after stating the facts). Substantially, the only question raised by the pleadings and proofs, as well as by the agreements of counsel, is, was the abstract of title furnished by plaintiff in error to defendant in error, under the agreement for the sale of the premises mentioned, a merchantable abstract? Counsel for defendant in error states the question as follows: "The issue raised by the pleadings, and upon which evidence was adduced, was whether the abstract furnished was merchantable, and in compliance with the terms of the contract. * * * It is not a question of whether the separate conveyances noted are correctly given, but whether or not it is made by an abstract maker whose product, as such, is merchantable." By the contract, Tidholm bound himself to furnish Harper a complete, merchantable abstract of title, or a merchantable copy. Harper insisted, by his answer and cross bill, and insisted here on argument, that Tidholm failed to do this, and that he was not, therefore, in default, for refusing to take conveyance of the property and to pay for it. No defect in the abstract or in the title was pointed out, nor was any alleged, but, as we understand counsel, the sole objection was and is this: That abstracts of title prepared and furnished by the recorder of deeds of Cook county are not merchantable. Eleven witnesses were examined by the master on behalf of the complainant, none having been offered by the defendant. These witnesses were lawyers, real-estate.

agents, and makers and examiners of abstracts, and conveyancers, and appeared to have special knowledge of the subject-matter of the inquiry. Two of these witnesses testified to the methods used in making abstracts by the recorder, and ten of them testified that these abstracts were merchantable, and that they passed current as reliable and properly prepared abstracts of title, among those buying and selling real estate, and having occasion to examine and pass upon titles. On cross examination, defendant's counsel drew from some of these witnesses statements to the effect that they had occasionally heard objections raised to the recorder's abstracts, sometimes based upon the supposed irresponsibility of the recorder, and sometimes raised by persons interested in the abstract companies. It is to be noted that the defendant below, although relying upon this issue of fact raised by the pleadings as substantially the only question in the case, called no witnesses and made no effort, except upon cross-examination of complainant's witnesses, to prove that these abstracts were not merchantable. No review of the evidence is called for, as it was substantially all in support of complainant's bill. It shows, without doubt, that the abstract furnished by Tidholm complied with his contract in that respect. If it was really desired to litigate the question whether or not these abstracts are merchantable, defendant below should have made some proof at least tending to disprove that adduced by his adversary.

Something is said in the argument about the rule that a court of equity will never enforce either a penalty or a forfeiture, and that the decree in this case is erroneous, in that it declares the contract forfeited, and that the complainant is entitled to retain, as liquidated damages the \$3,500 paid as earnest money. The forfeiture had been declared by the complainant, and the contract ended by him, in strict accordance with its terms, before the bill was filed; but Harper having placed the contract on record, it was a cloud on his title, and the bill was filed to remove that cloud. In affording this relief, it, of course, became necessary for the court to determine whether the contract was still subsisting or not; and the effect of the decree was to find that it had been terminated, in ac-

cordance with its terms, by the acts of the parties themselves, and that it was therefore null and void, and a cloud upon the title. As to the forfeiture of the \$3,500 earnest money, that had also taken place by the acts of the parties to the contract, and no question was raised by the answer or cross bill, or by the proofs, that this amount which the contract provided should be treated as liquidated damages, was in excess of the actual damages sustained by Tidholm by reason of Harper's default. The question, therefore, as to whether equity would go behind the terms of the contract, and declare the sum fixed by the parties as a measure of damages in case of default to be a mere penalty, and allow only the actual damages sustained, is not presented by the record. It is just as consistent with the facts proved that Tidholm's damages exceeded \$3,500, as that they were less; and the parties having agreed upon that sum, in their contract, as the true measure of damages, and it not being brought in question by the pleadings and proof, there is no occasion for this court to interfere in what seems to have been satisfactory to those appearing to be most interested. The decree of the superior court is affirmed. Affirmed.

Acc. *Freishschafio Lodge v. Alshenburger*, 235 Ill., 438.

CHAPTER VIII.

GROUND'S FOR EQUITABLE RELIEF.

SECTION 1.—ACCIDENT.

PATTEN v. CAMPBELL.

70 Ill., 72.

[Supreme Court of Illinois. September Term, 1873.]

Mr. Justice Craig delivered the opinion of the Court :

This was a bill in chancery, filed in the Superior Court of Cook county, by George W. Campbell, an assignee in bankruptcy of the late firm of Durham & Wood, against William Patton and others, to recover the value of certain goods which had been replevied by Patton & Co. from Durham & Wood.

It appears from the record that on or about the 20th of October, 1870, Patton & Co., of New York, sold Durham & Wood, of Chicago, a bill of goods, amounting to \$1600 on a credit of four months. About the first of November after the sale, Durham & Wood failed, and Patton & Co. commenced an action of replevin to recover the goods they had sold. A replevin bond in the penal sum of \$1000, in the usual form, was filed with the papers in the action, and \$800 or \$900 worth of the goods were replevied.

In the fire of October 8th and 9th, 1871, the papers in the case, including the bond, were destroyed. Subsequently the action was dismissed.

The defendants answered the bill, to which replication was filed, the cause was heard on the proofs taken, and decree rendered in favor of complainants for \$850.

The defendants bring the cause to this court, and seek to reverse the decree on two grounds :

First. For the reason a court of chancery has no jurisdiction, the remedy of complainants being complete at law.

Second. The purchase of goods from Patton & Co., by Durham & Wood was fraudulent, and Patton & Co., upon discovery of the fraud, had the right to rescind the sale and replevy the property.

The questions will be considered in the order in which they are raised.

The bill in this case is filed to recover upon an instrument under seal, which had been destroyed.

The jurisdiction of a court, of equity arising from accident is a very old head, in equity, and probably coeval with its existence. But it is not every case of accident which will justify the interposition of a court of equity. The jurisdiction will be maintained only when a court of law can not grant suitable relief, and where the party has a conscientious title to relief. 1 Story Eq. Jur., sec. 79.

In case, however, of lost instruments under seal, equity takes a jurisdiction on the ground that, until a recent period, it was the settled doctrine that there was no remedy on a lost bond in a court of common law, because there could be no proof of the instrument, without which the declaration would be defective. The jurisdiction having been assumed and exercised on this ground it is still retained and upheld. 1 Story Eq. Jur., sec. 81; *Walmsley v. Child*, 1 Vesey, Sen., 341; *Fisher v. Sievres* 65 Ill. 99.

SECTION 2.—MISTAKE OF LAW.

FOWLER v. BLACK et al.

136 Ill., 363.

[Supreme Court of Illinois. Jan. 22, 1891.]

Bill by Chase Fowler, as assignee of Alonzo S. Black, insolvent, against Alonzo S. Black, William G. Black, Ida M. Black, Samuel Black, Clarinda Black, Elizabeth C. Pratt, Sarah L. Mickings, and Levina Wilddey, to construe a certain deed from Samuel Black and Clarinda, his wife, to said Alonzo S. Black. Defendants filed a cross bill praying for the reformation of said deed. Complainant appeals from a decree reforming the deed.

Bailey, J. Delivered the opinion of the Court.

* * * * *

The question remains whether the allegations of the cross-bill taken as true, warranted the court below in reforming the deed. It sufficiently appears from said allegations that the grantors in said deed intended to reserve to themselves and the survivor of them a life-estate in said land, and to convey to Alonzo S. Black a life-estate therein, to commence in possession at the death of said grantors, with remainder in fee to Samuel A. and William G. Black. The case then made is, in substance, that said grantors, with the foregoing intention, went to a conveyancer, and instructed him to prepare such a deed as would carry their said intention into effect; that, under such instructions, the deed in question was drawn, and they, being aged, and not versed in the use of the language necessary to complete and effectuate their intentions, supposed and believed that said deed would accomplish that result; that said assignee now insists that said deed conveyed no title to Samuel A. and William G. Black, but that it conveyed the fee to Alonzo S. Black, subject only to the life-estates of the grantors; that, if said deed does not carry into effect the intention of said grantors, the failure to make it convey the fee-simple title to Samuel A. and William G. Black was through the mistake of said conveyancer in not using apt words to express the intent and desire of the grantors, as they directed and instructed him to do. The mistake now insisted upon, though not specifically stated in the cross-bill, consisted in the use of the word "heirs" instead of "children," and the court decreed the reformation of the deed by substituting the word "children" for the word "heirs" wherever it occurs in the instrument. There is no pretense that said grantors, at the time they executed said deed, were not fully aware of its terms and language, or that they were in any way deceived, misled, or otherwise imposed upon, or subjected to any undue or improper influence. It is not claimed that they did not read the deed before executing it, and the legal presump-

tion that they did so must therefore prevail. It must be assumed, then, as a fact as to which there can be no dispute, that the grantors, when they executed the deed, knew that the word "heirs" was used, and that the word "children" was not used. Nor is it claimed that the conveyancer or any other person gave them any advice as to the legal effect of the word thus employed, or as to whether the deed would give effect to their intentions or not. It is clear, then, that the mistake complained of is not a mistake as to any fact, but simply as to the meaning and legal effect of the word "heirs" when used in a conveyance of the title to land. This, manifestly, is purely a mistake of law. The general rule—subject, it is true, to certain exceptions—is that courts of equity will not lend their aid to relieve against mere mistakes of law. Mr. Justice Story, in discussing the rule and its exceptions, after analyzing and reviewing at considerable length the leading decisions bearing upon the question, reaches the conclusion that the rule is relaxed in cases where there is a total ignorance of title founded in a mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, or surprise. "But," says the learned author, "it may safely be affirmed, upon the highest authority, as an established doctrine, that a mere naked mistake of law, unattended by any such special circumstances as have been above suggested, will furnish no ground for the interposition of a court of equity." 1 Story, Eq. Jur. §§ 137, 138. The general rule above laid down has been frequently recognized and enforced by this court. Thus, in *Sibert v. McAvoy*, 15 Ill. 106, a bill was filed to reform a contract after the complainant had made certain unsuccessful attempts to enforce it at law, it being alleged in the bill that a mistake had been made in its phraseology by the person employed to write it. In denying the complainant relief this court said: "If he misconstrued the contract as written, that was a mistake of law, and not of fact, and for such mistakes equity can grant no relief.

It is where parties intended to insert words in a contract which were by accident omitted that equity can reform the contract by inserting them, or by expunging words they did not intend to have inserted. If the words are written as the parties intended they should be written, or supposed they were written, when they signed the contract, no matter how much they may be mistaken as to the meaning of those words, no relief can be granted either at law or in equity. The construction of words is a matter of law. The insertion of words is a matter of fact. It is for mistakes of fact alone that contracts may be reformed." In *Goltra v. Sanasack*, 53 Ill. 456, the complainants' father, in his life-time, purchased certain lands, and had them conveyed by the vendor to his wife and her heirs. After his death, the complainants, who were his children by a former wife, filed their bill to reform said deed, alleging that their father intended to have said lands conveyed to his wife and his said children, and supposed that the grantor had so conveyed them, but that, contrary to such intention, the conveyance was in fact made to said wife and her heirs. In denying the relief thus prayed for we said: "The rule is inflexible that a mistake or misapprehension of law is never relieved against or corrected. If a party designs to and performs an act under a mistaken view of the law affecting the transaction, he is held to the obligation incurred. As a matter of necessity all persons are presumed to know and act in view of the law, and the maxim is that ignorance of the law excuses no one." Many other decisions may be referred to in which the rule under consideration is discussed in its various aspects, among which are the following: *Broadwell v. Broadwell*, 1 Gilman, 599; *Beebe v. Swartwout*, 3 Gilman, 162; *Shafer v. Davis*, 13 Ill. 395; *Campbell v. Carter*, 14 Ill. 286; *Gordere v. Downing*, 18 Ill. 492; *Wood v. Price*, 46 Ill. 439; *Sands v. Sands*, 112 Ill. 225; *Bonney v. Stoughton*, 122 Ill. 536; 13 N. E. Rep. 833. It would thus seem to be an inevitable conclusion from the authorities that the case made by the cross-bill is one upon which a

court of equity can grant no relief, and that the decree of the court below reforming said deed is erroneous. For the foregoing reason decree will be reversed, and the cause will be remanded to the circuit court, with directions to dismiss the cross-bill for want of equity, and to enter a decree upon the original bill, giving construction to said deed in accordance with this opinion, the costs in this court and in the circuit court to be paid by said assignee out of the assets and estate of the insolvent in his hands.

See however. *Kyner v. Boll*, 182 Ill., 171.

Acc. *Atheton v. Roche*, 192 Ill., 252.

SANDS v. SANDS.

112 Ill., 225.

[Supreme Court of Illinois. January 22, 1885.]

Mr. Chief Justice Schofield delivered the opinion of the Court:

John P. Sands, and Candace, his wife, lived on a farm of one hundred and twenty-six acres, in Whiteside county, the title whereof was in him, from some time in the year 1847, and raised thereon a family of eight children, of whom five survived their father. The farm was opened and improved and cultivated, as we infer from the evidence, by the joint labor of all, each contributing, as is usual in such cases, to the extent of his or her ability, in his or her own way. As the children, respectively, attained their majority, they left home, and thereafter conducted business for themselves. Before the year 1873 they had all left home, the father and mother remaining alone upon the farm. Marcus, the youngest child had learned the carpenter's trade, and after having had employment at different places, late in the year 1873 was induced by his father and mother to return and live with them upon the farm, and work it for a share in the products. In 1874 he was married, and then removed into and dwelt in a house some fifteen rods distant from that occupied by his father and mother, but on the same forty-acre tract of land, and thenceforth he continued to work the farm, as before, for a share in the products. Early in the year 1881, John P. Sands conveyed, through Marcus, to

Candace, the forty acres whereon were the houses occupied as dwellings, and which is the tract affected by this controversy. Candace made her will, whether before or after she received this title is not very clear from the evidence, intending thereby to devise this tract to Lelia, the wife of Marcus. About the middle of May, 1881, Candace became sick, and remained sick until in July following. While she was thus sick (on the 3d day of June) she executed the deed, re-execution of which is now sought to be coerced, and some time afterwards, probably during the same summer, she destroyed this deed. John P. Sands devised the remaining eighty-six acres of the farm to Marcus, by his last will, and died on the 11th day of June, 1883. Marcus has paid no rent, and rendered no account to Candace, at any time. Prior to the death of John P., Marcus accounted to him, and paid rent for the entire farm. Thus far there is no substantial dispute as to the facts; nor is it disputed that when this deed was executed, Candace owned no other property, that no one was present at the execution of the deed save Marcus and the notary taking the acknowledgment, and that no one else, save the wife of Marcus, had knowledge thereof, although, at the time, John P., and an aunt of Marcus, and a servant girl, were all in an adjoining room.

The deed was executed at the instance of Marcus. His wife, at his instigation, informed Candace that the will was not satisfactory. They were afraid the will might be broken by the other heirs, and it was preferred the title should be in Marcus, instead of his wife. At the time the deed was executed, Candace was in her seventy-third year of age, and, beyond all question, quite sick. We think it evident, from the testimony, that apprehension of approaching dissolution was the cause of the execution of the deed at that time. No one had previously spoken to Candace upon the subject of executing the deed, but Marcus and his wife. He took the old deed to the notary, had a deed from her to himself drawn, brought the notary to the house, had him introduced to her presence, and the deed signed by her and ac-

knowledge before the notary, without the knowledge of the other inmates of the house. No opportunity of consultation or advice was allowed or offered. That Candace did not ask or seek such advice only proves how completely she was under the control of Marcus. Here she was, according to his version, absolutely giving away everything that she had, at an age when she could no longer earn a support, and her husband, her natural adviser and protector, only a few feet distant, kept in profound ignorance of what she was doing.

The physician who attended upon Candace says that she had hysteria, and that there were periods during her sickness when she was incapable of transacting business. Other witnesses testify, that in their opinion she was insane on the third of June, and incapable of acting rationally in business matters. It is shown that about that time she made several attempts to commit suicide, was easily provoked to tears, and was very nervous and excitable. The evidence shows beyond question, that age and disease had affected her mind to some extent, weakened her will power, and impaired her judgment; and so, at all events, it is, in our opinion, quite clear that she was in a condition to receive, without question, almost any representation as true, if made by one who had her confidence, as Marcus had, and incapable of judging and determining its legal accuracy. She testifies that both Marcus and the notary informed her the deed would be worthless,—“of no more value than a piece of brown paper,” if she got well; that it could not take effect until recorded, which he promised should not be done while she lived, and that she never delivered it to take effect than as a deed, but that she simply delivered it to Marcus with the request that he would place it among her other papers. It is true he does not admit this, but says that the delivery was absolute. He does, however, admit that she requested him not to have it recorded then, nor until after her death, and there is other evidence proving that she had been made to believe that it would not take effect until it was recorded.

An examination of the evidence of Marcus fails to impress us favorably in his behalf. This record shows that he admits that he had called his mother a liar, and, from the evidence, he shows a disposition to deny her all means of support, at a time of life when she is no longer able to help herself. He is made to appear willing to take advantage of her affection and weakness in order that he may plunder her of what she has, and then leave her to the charity of the law to obtain a support where it may enforce it, for the evidence shows that he has refused to account to her for rents and profits, and that he said to her that if any one must leave the land, it would be her. Much confidence ought not to be, and can not be, placed in the evidence of one thus shown to be so selfish, and so devoid of filial affection and respect, where the direct effect of his evidence is to give him property, or take it from him. With such, the distinctions between right and wrong are not well defined and marked, and the love of truth, as a mere matter of sentiment, is not apt to control in such minds.

Although the general principle is, a court of equity will not, ordinarily, relieve against a mere mistake as to the law, still where the mistake is induced by a party taking advantage of it, and the relations are such that the party deceived is dependent upon the party deceiving, or is otherwise peculiarly under his influence, a court of equity will interfere, and protect against any advantage thus obtained. *Bispham's Principles of Equity*, (2d Ed.) sec. 188; *Kerr on Fraud and Mistake*, (Bump's ed.) 400; *Wheeler v. Smith*, 9 How. 55.

The mere relations and situations of these parties condemn this transaction. It cannot be tolerated that a mother, whose mind is weakened by age and disease, shall be overreached through her affection for a favorite child; and thereby pauperized, and made a charge upon the public or a burthen upon her other children, so long as the rights of third parties are not affected. Parties thus related occupy unequal positions. Naturally, and it may be unconsciously such a son will have an undue influence over such

a mother. The rule is, where a person enfeebled in mind, by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done **through the** influence of the donee. *Haydock v. Haydock*, 7 Stew. (N. J. Eq.) 570; *Huguenin v. Baseley*, 2 L. C. in Eq. (4th Am. ed.) notes, 1183-1185; Am. notes, 1192-1194; *Bispham's Principles of Equity*, page 296, sec. 235. And so where a son, believing that his father, who had the "blues," was incompetent to manage his own affairs, took charge of them, the father passively submitting, and the son also induced the father to execute to him a deed of his farm, and to transfer all his personal property to him, it was held that the transaction was presumptively void, and it was incumbent on the son to show conclusive good faith. *Jacox v. Jacox*, 40 Mich. 473.

There is some pretense, here, that the conveyance was for a valuable consideration,—the leaving off, by Marcus, of working at his trade, and his coming upon the farm and working it. The evidence before us does not so clearly and precisely prove such a contract that we can say it should be specifically enforced, and it is only when the evidence in such cases is clear and precise, that a court of equity will decree specific performance. But if such a contract was made, it is clear, beyond dispute, that it contemplated the use of the land, or rent of that part not personally occupied and used by Candace, during her lifetime, and Marcus has repudiated the contract by denying her rights, and neglecting to pay her rent. This court held in *Frazier v. Miller*, 16 Ill. 48, that such subsequent denial of the rights of the grantor, under a similar contract, would justify its rescission by a court of equity. The same doctrine was re-announced in *Oard v. Oard*, 59 Ill. 46, and it was there said that if the rescission of the contract in cases of such character could not be referred to any other head of equity jurisdiction, it would be proper to presume that it was, in

the first instance, made with fraudulent intent. *Jones v. Neely*, 72 Ill. 449, recognizes the same doctrine.

Candace Sands, according to the clear preponderance of this evidence, never intended to invest a present title, and did no act which she intended as an absolute delivery of the deed. She was induced by Marcus and the notary to believe, and did believe, the deed would not take effect until recorded, and as to him, therefore, it must be held it did not take effect, and might be destroyed at her pleasure.

We think the court should have denied relief on the original bill, and granted relief on the cross-bill, and for the error in that regard the decree below is reversed, and the cause remanded, with directions to the court below to now so decree. Decree reversed.

SECTION 3.—MISTAKE OF FACT.

PARKER v. BENJAMIN.

53 Ill., 255.

[Supreme Court of Illinois. January Term, 1870.]

Mr. Justice Lawrence delivered the opinion of the Court:

We are of the opinion the decree in this case is correct. The deposition of Charles E. Parker, a disinterested witness, and cognizant of the transaction from its beginning, clearly shows that it was the forty acres with the pond upon it, about which the parties were contracting. At the time of the negotiation, the agent of appellant, with whom the business was transacted, said it made no difference which of the forties the purchaser took, and that he must decide upon the numbers, as the agent did not know which forty had the fishing privilege. It was perfectly well understood that this privilege was the object of the purchase, and hence the first deed which was sent out from Massachusetts, and which did, in fact, include the pond, was sent back before it was recorded, from a mistaken idea that the pond was on the other forty, and the defendant then executed a new deed. It then being discovered that the first deed was in fact correct, and the sec-

ond did not include the pond, but the purchase money having meanwhile been paid, the defendant refuses to correct the error, and convey the land described in the first deed. He may suppose that having already made two deeds, he should not be called upon to make a third, but the error in the description having been the result of a misapprehension on both sides, equity requires that the mistake should be corrected, and the vendor should convey to the purchaser the land concerning which the contract was really made, on receiving back the title to the forty acres conveyed by mistake. No equities of third persons having intervened, nor does it appear that there has been any change in the condition of either tract. Decree affirmed.

STEINMEYER et al. v. SCHROEPPel.

226 Ill., 9; 80 N. E. R., 564

[Supreme Court of Illinois. Feb. 21, 1907.]

Cartwright, J. Appellants are in the lumber business at Collinsville, Ill., and appellee is a building contractor at same place. On June 10, 1905, appellee was about to erect a building for himself. and left at the office of appellants an itemized list of lumber, containing 34 items, on which he desired them to give him a price. Appellant's bookkeeper set down upon that list, opposite each item, the selling price, but did not add up the column. If correctly added the column would have footed up \$1,867. One of the appellants made the addition, and, by mistake, made the total \$1,446. The bookkeeper copied the list on one of appellants' billheads without the prices opposite the different items, and wrote at the bottom, "Above for \$1,446," and delivered the paper to appellee the same evening. Appellee received bids for the lumber from two other firms, which were in the neighborhood of \$1,890. On June 16th appellee called at the office of appellants and accepted their offer. He did not bring the paper with him, but the bookkeeper made another copy and at the bottom of it wrote the same memorandum, "Above for \$1,446." One of the

appellants signed it, and a memorandum was then written below to the effect that if delivery was made within 30 days the appellants were to have \$20 more than the estimate, but if delivery was made after 30 days appellee was to have a rebate of \$20 from the estimate, and this was signed by both parties. The same evening one of the appellants, looking over the bill, found that he had not added the amounts correctly, and the next morning one of them notified appellee by telephone of the mistake, and refused to furnish the lumber for less than \$1,867. Appellants also sent appellee a notice that they had found an error of \$421, and the estimate should read \$1,867 instead of \$1,446. Appellants did not furnish the lumber, and appellee purchased it at the next lowest bid from another firm, and sued appellants for the difference between what he paid for the lumber, and what they had agreed to furnish it for. Appellants then filed a bill to enjoin the prosecution of the suit at law, and to have the contract canceled on account of the mistake. The suits were consolidated and tried together without a jury. The circuit court entered a decree, canceling the contract, and restraining appellee from prosecuting his suit at law. The appellate court for the Fourth District reversed the decree, and remanded the cause to the circuit court, with directions to dissolve the injunction and dismiss the bill for want of equity. Appellants applied to the Appellate Court for a certificate of importance, which was granted, and this appeal was prosecuted.

The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made. 2 Kent's Com. 477. If there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject-matter or terms from what was intended, equity will give to such party a remedy by cancellation where

the parties can be placed in statu quo. The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract. 24 Am. & Eng. Ency. of Law (2d Ed.) 618. The fact concerning which the mistake was made must be material to the transaction and affect its substance, and the mistake must not result from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. *Bonney v. Stoughton*, 122 Ill. 536; 13 N. E. 833. In this case the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about \$400 was placed somewhat to the right, and in adding the column the 4 was counted in the 10-column instead of the 100-column. If that was done, it does not account for the difference of \$421. But if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of *Board of School Com'rs v. Bender*, 72 N. E. 154 (decided by the Appellate Court of Indiana, Division No. 2) relied on by appellants, differs from this in various respects, one of which is that *Bender* was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock; that in ignorance of the fact and for want of time he was hurried in submitting his bid, and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract, and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into

the contract. By the terms of the bid it was intended that if the bid was accepted a contract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault. In the case of *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for \$161.50, but the defendant intended to state the price at \$261.50. When the defendant was informed that the plaintiff understood the price to be \$161.50 he refused to deliver the cattle and tendered back \$20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify a relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such a character as to entitle the appellants to the relief prayed for.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Contra. *Bromagin v. City of Bloomington*, 234 Ill., 114.

SECTION 4.—MISTAKE OF EXPRESSION**DINWIDDIE v. SELF.****145 Ill., 290.**

[Supreme Court of Illinois. April 3, 1893.]

Bill by Mary J. Self against Samuel W. Dinwiddie to reform a deed. Complainant obtained a decree. Defendant appeals. Affirmed.

Bailey, C. J., (after stating the facts). While the evidence of the negotiations which resulted in the purchase from the defendant by the complainant of the land subsequently conveyed is not very full or circumstantial, yet we think it shows with sufficient clearness that the contract which the parties intended to make, and which they in fact made, was for the purchase and sale of the fee. Indeed, upon this question there seems to be no substantial disagreement in the testimony of the witnesses. The complainant testifies, in substance, that, shortly prior to the execution of the deed, she, with her brother, visited the defendant's farm to look at it with a view of purchasing it; that, after she had been over it, the defendant offered it to her for \$9,000; that nothing was said about the reservation by the defendant of any portion of the title or of any interest in the land, her understanding being that the defendant offered to convey to her the land in fee for the price named; that she did not accept the defendant's offer at that view, but subsequently, on the same day, having concluded to accept it, she sent her brother to the defendant to notify him of such acceptance. Her testimony is substantially corroborated by that of her brother, who went with her to see the farm, and he further testifies that \$9,000 was the fair cash value of the land at that time, and in this he is not disputed by any other witnesses. The defendant testifies that the complainant and her brother came to see the farm, and that he then gave them the price at which he would sell it; that his offer was not accepted at that interview, but that on the same day the complainant's brother came back, and said they would take the place; that when he sold the land to the complainant

he did so with the intention and expectation of conveying to her all the estate he had with it. It is also clear that the deed which the defendant afterwards executed in performance of the contract of sale thus made was not a conveyance to the complainant of the fee. The conveyance was limited to the complainant "and her bodily heirs,"—a limitation which, at common law, would have created an estate in fee tail. But by section 6 of chapter 24 of the Revised Statutes of 1845, which was in force at the time the conveyance was made, and which has since been re-enacted as section 6 of chapter 30 of the Revised Statutes of 1874, estates in tail are abolished, and it provides that in cases where, by the common law, any person might become seised in fee tail of any lands by virtue of any conveyance, such person, instead of becoming seised in fee tail, shall be deemed and adjudged to be and become seised thereof for his or her natural life only, and the remainder shall pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the grantee, first pass, according to the course of the common law, by virtue of such conveyance. The complainant, at the time of the execution of the deed to her, was a widow, and without children or descendants. No person, therefore, was then in being who, upon her death, could have taken as heirs of her body. It is true, she was then contemplating marriage, and shortly after the execution of the deed was married to her present husband. The deed, then, by force of the statute, conveyed to her only a life estate, with a contingent remainder in fee to her children, if any such should afterwards be born, and, in default of heirs of her body, the estate in remainder necessarily lapses, and at her death the land reverts to the defendant in fee. In point of fact she has had no children, and as she claims, and as her evidence tends to show, she is now past the period of childbearing, and the probable, if not the necessary, result, if the deed is allowed to stand as it was executed, is that the estate thereby conveyed is only for the life of the complainant, with reversion in fee to the

defendant and his heirs. That such is not the estate for which the complainant contracted when she purchased the land is, to our minds, too clear for controversy.

Upon these facts two questions arise: First, whether the limitation to the complainant "and her bodily heirs" was inserted in the deed by mistake; and, second, whether it is a mistake which the court of equity will correct. The evidence as to the way in which this limitation happened to be inserted in the deed is, in substance, as follows: At the time the complainant purchased the land she was living at her father's house, and he seems to have taken charge to some extent, of her business affairs. After she had been to see the defendant's farm, and had concluded to purchase it at the price offered by the defendant, and had requested her brother to communicate to the defendant her acceptance of his offer, her father seems to have taken it upon himself to procure the execution of the conveyance, and for that purpose he sent the complainant's brother to the defendant to close the transactions up and get the deed. His instruction to the agent thus sent was to have the deed drawn with a limitation to the complainant and "her bodily heirs," and he, in pursuance of such instruction, had the deed drawn up and executed with such limitation, and in that form placed it on record. The complainant testified that the instruction thus given by her father to her brother was wholly without authority from her, and without her knowledge or consent, and that she was not aware of the insertion of such limitation in the deed until a considerable time after the deed was executed, and after her marriage to her present husband. Her father is dead, and his testimony is therefore not available. Her brother testifies to having received his instructions from his father, but he has no recollection of having conversed with the complainant about the matter, or having received any instructions from her in relation to it. It follows that there was no direct evidence tending to dispute the testimony of the complainant on this branch of the case. The defendant testifies, it is true, that after the deed was executed he carried it to

the house of the complainant's father, and there personally delivered it to the complainant, and that she and her father then examined it, and said it was just as they wanted it. In this, however, he is directly contradicted by the complainant, who testifies that, at the time the defendant claims to have visited her father's house, she was not there, she having left some days before, and having gone to another place some distance away, where she remained until after her marriage, and that she never saw the defendant, to her recollection, except at the time she went to see the farm prior to the purchase. She also swears that the first time she saw the deed was some time after her marriage, when it was brought to her by her husband. As to the difference in the recollection of these two witnesses it is only necessary to say that the judge of the court below, who saw the witnesses and heard them testify, and therefore had better means of judging as to their respective credibility than we can have, reached the conclusion that the defendant was mistaken, and we can see no reason why we should not accept his conclusion as the true one. The view of the testimony taken by him was that, while it may be true that the defendant took the deed to the house of the complainant's father, and conversed with him about it, he is mistaken in his recollection that the complainant was present. In view of all the evidence, then, we are of the opinion that the court was justified in finding that neither the complainant's father nor her brother had any authority from her to procure the insertion, in the deed conveying the land to her, of a limitation of the estate conveyed, to her and the heirs of her body, and that such limitation was inserted in the deed wholly without her knowledge, authority, or consent. Neither her father nor her brother is shown to have been in any proper sense her general agent. The contract of purchase was made by herself in person, except merely that she employed her brother to communicate to the defendant her acceptance of the offer which he had previously made to her. What her father and brother subsequently did by way of consum-

inating the purchase and obtaining the conveyances seems to have been done, not by virtue of any specific employment by her, but by way of rendering such voluntary assistance as a father and brother, having a proper interest in her welfare, would naturally render under such circumstances. Their authority to act as her agents, so far as the evidence shows, was merely voluntary on their part, and permissive on hers, and extended merely to closing up the purchase as she had made it, and not to the imposition of new terms, or the insertion of limitations, to which she had not assented, and of which she knew nothing. The defendant's testimony throws some light upon the motives which actuated the complainant's father in instructing her brother, when he sent him to look after the execution of the deed, to have that instrument drawn so as to limit the title conveyed to the complainant and her heirs of her body. The defendant testifies that the brother gave, as a reason why they wished such limitation inserted, that the complainant was about to be married, and they wanted the deed so drawn that no person—referring probably to her intended husband—could get hold of the land. If, then, the limitation was inserted for such purpose, without the complainant's knowledge or consent, it was in the nature of a fraud upon her, of which the defendant had notice, if he did not actively participate in it. She bought the land for herself, and paid for it with her own money, and any attempt by her father and brother, for purposes of their own, to place limitations upon the title without her knowledge or authority, were unauthorized acts, for which she should not be held responsible. Keeping out of view for the present any question of laches on the part of the complainant, we think her right to a reformation of the deed is undoubted. It is not an adequate execution of her contract of purchase, that contract being for the fee, while the deed leaves the reversion, after her life estate, in the grantor.

The defendant's contention, however, is that, even though the deed does not express the intention of the parties, the

mistake is one of law, which a court of equity cannot correct. If the deed had been executed as an original transaction, and not by way of performance or of putting into form of an antecedent oral contract between the parties, then if it had appeared that the complainant's brother, in procuring its execution, had authority on her behalf to procure or consent to the insertion of the limitation to her and the heirs of her body, in such way as to give the act the same legal effect as though performed by herself, there would probably be much force in the defendant's contention. If under the circumstances supposed, she had personally requested the insertion of this limitation, or had accepted the deed with full knowledge of its terms, she would have been bound by the instrument as executed, however much she may have been mistaken as to the legal effect of the language thus employed. An illustration of this rule may be found in the case of *Fowler v. Black*, 136 Ill. 363, 26 N. E. Rep. 596. The same effect would doubtless be given to the act of her agent, if his authority had extended to the adoption and acceptance on her behalf of the same clause. But, as we have seen, the evidence fails to show the existence of such authority. The general rule is that a mistake of law, pure and simple, is not adequate ground of relief. Where a party, with knowledge of all the material facts, and without any other special circumstances giving rise to an equity in his behalf, enters into a transaction affecting his interests, rights, and liabilities, under ignorance or error with respect to the rules of law controlling the case, the courts will not, in general, relieve him from the consequences of his mistake. 2 Pom. Eq. Jur. § 842. Accordingly, if an agreement, or written instrument, or other transaction, expresses the thought and intention which the parties had at the time and in the act concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different if they had not been mistaken as to the legal meaning and effect of the terms and provisions by which such intention

is embodied and expressed, even though it should be incontestably proved that their intention would have been different if they had been correctly informed as to the law. Id. § 843. But, firmly settled as are the foregoing rules, it is equally settled that there are particular instances in which equity will grant defensive and affirmative relief from mistakes of law, pure and simple, as well as from those accompanied by other equitable incidents. Among the particular incidents where such relief will be granted, the learned author to whom reference is above made lays down the following: "If an agreement is what it was intended to be, equity will not interfere with it because the parties have mistaken its legal import and effect. If, on the other hand, after making an agreement, in process of reducing it to a written form the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with appropriate relief, either by way of defense to its enforcement or by cancellation or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract as actually made; but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant relief, affirmative and defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. Among the ordinary examples of such errors are those as to the legal effect of a description of the subject-matter, and as to the import of technical words and phrases; but the rule is not confined to these instances." Id. § 845. To similar effect, see *Oliver v. Insurance Co.*, 2 Curt. 277; *Champlin v. Laytin*, 6 Paige, 189, 18 Wend. 407; also authorities cited by Mr. Pomeroy in note to section 845. The present case clearly falls within the exception to the

general rule thus pointed out and discussed by Mr. Pomeroy. The defendant's offer was to sell to the complainant the land,—an offer which, made, as it was, without limitation or qualification, and for a consideration equal to the fair cash value of the land, must be understood as a proposition to sell the fee,—and the offer was accepted by the complainant precisely as it was made. A contract was thereby consummated for the sale and conveyance by the defendant to the complainant, for the consideration named, of an absolute fee-simple title to the land. Both parties understood that the conveyance was to be in fee, and both intended that the contract should be so executed; but by the unauthorized act of the complainant's agent, or by the mistake of the scrivener, it matters little which, technical words were inserted, the legal effect of which was to limit the estate conveyed to the complainant to a tenancy for her life only. Thus, through a mistake of law, the conveyance failed to express the contract into which the parties had actually entered. It follows that the case is one in respect to which a court of equity, upon principles above set forth, will grant relief. * * *

Other objections to the decree are alleged which we have duly considered, but which we do not regard as tenable, or as calling for discussion. We are of the opinion that the decree is warranted by the evidence, and it will therefore be affirmed.

Acc. *Atherton v. Roche*, 192 Ill., 252.

SECTION 5.—ACTUAL FRAUD—MISREPRESENTATION.

MILLER v. WHELAN.
158 Ill., 544; 42 N. E. R., 59.

[Supreme Court of Illinois. Oct. 14, 1895.]

Baker, J. This is an appeal taken by A. H. Miller from a decree rendered by the circuit court of Moultrie county in a cause in equity wherein Margaret Whelan was complainant and said Miller and numerous other persons were

parties defendant. Both errors and cross errors have been assigned. Margaret Whelan and Harvey M. Whelan, her husband, were owners and tenants in common of a farm in Moultrie county containing 98½ acres of land. They resided on this farm with their family, and it was incumbered by a mortgage given by them to one A. H. Antrim to secure an indebtedness of \$500 and the interest thereon. Said Harvey died intestate in March, 1888, leaving said Margaret as his widow, and their seven children, as his heirs at law. He left only \$30 in cash on hand, and but little personal property, and his widow became the administratrix of his estate. She continued to live on the farm, with her infant children, and seems to have been hard pressed to realize enough of income thereupon to maintain the family, pay taxes, and keep down the accruing interest on the mortgage, which was payable semi-annually. She arrived at the conclusion that it would be better to sell enough of the land to pay off the mortgage, and keep the rest of the farm to live on with her children. With this end in view, she went to Sullivan, the county seat, to get a lawyer to fix it up. She called at the law office of Smyser & Miller, and the result was that on July 30, 1889, a bill for the partition of the undivided one-half interest in the ninety-eight and one-half acres of land of which Harvey M. Whelan had died seised was filed in the circuit court, the said Margaret Whelan, and the infant children and heirs of the deceased, who sued in that behalf by Margaret Whelan, their next friend, being joined as parties complainant. See *Roodhouse v. Roodhouse*, 132 Ill. 360, 24 N. E. 55. Such proceedings were had in the partition suit as that a final decree was rendered therein at the November term, 1889, for the sale of the undivided one-half interest therein subject to the homestead of said Margaret Whelan. It may here be stated, by way of explanation, that A. H. Miller, the appellant, was one of the two members of the copartnership that transacted law business under the firm name of Smyser & Miller; that he was never admitted to the bar, or had any license to practice law, either in this

state or in any other state; and that at the time the copartnership was formed, in January, 1889, he had never read a single law book. And it may also be stated, for like purpose of explanation, that at the time of the transaction involved in this case appellee was wholly ignorant of business and legal matters; that it appears both from her own testimony and that of other witnesses that she has a good memory for facts and for details; and that it appears both from the expert testimony of physicians and from the testimony of her neighbors that she is lacking in judgment, and is regarded as mentally weak, and incapable of transacting and conducting business affairs. As one of the witnesses, Dr. Kellar, who at the time of his examination was a physician and surgeon 63 years of age, expresses it, her mind could be impressed so as to retain details, yet was too weak to comprehend relations. After the decree, and after the master had advertised the land for sale, appellee had an interview with appellant at his office. He testifies: "I asked her if she had the money to purchase the farm in the case it sold for less than its worth. She said she did not have any money. I told her then that I would furnish the money; buy the farm for her. Would buy it in my own name, and would sell it, and give her the proceeds, outside of what money I was out and the interest on the same; but before I would do that she would have to deed to me her interest in said premises. I told her I would enter into a contract to do what I have above stated." She testified in regard to the contract: "It was written out. I knew nothing about it until Mr. Miller called on me to sign it. I asked him if it could not be fixed any other way, so I could buy in myself. He said, 'No'; not unless I had money. He said he would buy it in for me, and make it all right." And further testified: "He said it could not be done in any other way. I told him I did not understand it. He said it was the only right way to do it." And in regard to the deed that she executed on the day of their conversation she testifies that appellant said it was "nothing but a show deed, for the purpose of pro-

tecting the land for me. * * * He said it was not to be recorded; it was simply a form, so he could buy the land in for me." Samuel Whelan, a son of appellee, 14 years old, testifies that he was present at the conversation, and that appellant "said that it was a show deed to protect him, for she didn't have the money to buy it in with. She said that she didn't think that there was any use of making that deed; but he said that that was the only way it could be done; for he knew the law and she didn't. She said if it had to be done, all right." On the day of this interview, December 23, 1889, appellee executed and delivered to appellant a deed conveying all her interest in the land, and waiving and releasing her homestead; and at the same time the parties signed a certain agreement in writing. By said contract appellant agreed to buy the land at the master's sale on January 4, 1890, and take control of the same for six months, for the sole and only purpose of affecting a sale thereof on the best terms practicable; such sale to be subject to the approval of appellee. It was further agreed that, if a sale was made within the six months, then out of the moneys thereby realized appellant was to retain all the money paid out by him for the purchase made at the master's sale, with 8 per cent. interest thereon, and also reasonable compensation for making the sale, and pay the balance of the proceeds to appellee. It was further agreed that, in case appellant was unable to effect a sale within the six months, at the expiration of that time appellee was to pay to appellant all moneys paid out by him in the transaction, with 8 per cent. interest thereon, and appellant was to convey the premises to appellee. And it was also provided in the agreement that if appellee was unable to refund the moneys and interest at the end of the six months, then, and in that case, appellant was to take the note of appellee for such moneys and interest, said note to bear 8 per cent. interest, and to run not less than two years from the date thereof, and to be secured by a mortgage on the premises. At the master's sale made on January 4, 1890, under the decree in the partition suit, the un-

divided one-half interest in the lands that was vested in the husband of appellee at the time of his death was struck off and sold to appellant at \$620, that being the amount of the Antrim mortgage, plus the costs and expenses in said partition suit; and \$50 of these costs was fee to Smyser & Miller. Appellant did not pay to the master the money to settle the mortgage, nor did he or any one else ever pay or satisfy said mortgage, but it remained a lien upon the premises until April, 1893, when it was foreclosed by the mortgagee. And so it is plain that appellant never paid to the master, on his bid of \$620, to exceed \$70 in money.

On the 24th day of February, 1890, the master in chancery executed and acknowledged a deed conveying to appellant the premises that had been struck off and sold to him as above stated; and on the same 24th day of February, 1890, appellee executed and delivered to appellant a warranty deed in which she conveyed and warranted to Joanna Miller, the wife of appellant, A. H. Miller, not simply an undivided interest in said lands, but the entire interest in the whole of said lands and waiving her rights of homestead thereon. The acknowledgment to this deed was taken by appellant, as a notary public, and the deed was filed for record on the same day it bears date. In regard to this latter transaction, appellee testifies that, at the time she signed the deed to his wife, A. H. Miller "told me it was necessary that I should sign it; that he also had a good deed; that the land was his; that he wanted it deeded to his wife. I told him it was hard to have to give it up, and I told him when I made the show deed that he said it did not amount to anything. He said I would have to sign that or I would not get anything. He said he would give me \$1,300 for it, and he would pay the mortgage and expenses out of it, and give me what was left. He would also sell it for two-thirds more than he paid for it, before the year was out." And she testifies on cross-examination: "It was not my price on the land. He took it at his own price. I had nothing to say about it at all. He said if I did not take that I would not get anything, and I would lose the farm entirely. I had to do as he said, or I would lose everything.

* * * I told Mr. Miller I did not want it sold at all, only enough to pay the mortgage. Mr. Miller said I was already in his power, and I would have to do as he said. * * * Mr. Antrim told Mr. Miller to tell me that I could let the mortgage run on as long as I paid the interest. Mr. Miller did not tell me anything about it until Mr. Steele drew his attention to it. That was after he had the farm in his hands. He made me believe that Mr. Antrim would sell the farm for the mortgage. Whenever I asked him questions about it, he would say, 'I understand the law, and you don't.'" Samuel Whelan, the son of appellee, already mentioned, testified that he was present when the deed was made by his mother to Joanna Miller, and he said: "A. H. Miller said he had a good deed for the place, but he wanted to deed the place to his wife. She said it looked mighty hard to have to give up the place. A. H. Miller said that if she didn't deed the land to his wife, she wouldn't get anything for the place." On March 1, 1890, appellant, by his deed of that date quitclaimed all his interest in the lands to his wife, Joanna Miller; and on or about the same day he rented the farm to one Rush Plummer, and induced him to move forthwith into the house on the farm, still occupied by appellee and her family; and one or two days thereafter—March 3, 1890—said Plummer, by the procurement of appellant, moved appellee and her family off the farm, and into a house in Sullivan, that appellant had rented, and for which he had paid \$8 as a month's rent in advance; and on March 7, 1890, appellant purchased from one Spitler a house and two lots in Sullivan for \$460, and had the same conveyed by Spitler to appellee, and induced her to move, with her family, to said premises.

The original bill herein was filed by appellee on June 13, 1890, and on November 18th of that year an amended bill was filed, and in April, 1891, a supplemental bill was filed. All necessary parties seem to have been made defendants in the suit, and answers and replications were duly filed. Pending the litigation the defendant Joanna Miller died intestate, and Robert C. Miller, her only child and heir at law, was brought into the suit as a defendant. The cause was re-

ferred to a special master in chancery to take the testimony, and report the testimony so taken, and his conclusions as to both law and fact, to the court. The said master made report, finding against the validity of the partition proceedings and sales made thereunder; that the deed from appellee to appellant was procured by fraud and circumvention; that the deed from appellee to Joanna Miller, wife of appellant, was obtained by means of threats and intimidation; that the whole of the purchase price of the lots in Sullivan was paid by A. H. Miller; that Margaret Whelan was a person of weak mind, and incompetent to attend to ordinary business; that, at the time all of the different transactions took place, A. H. Miller was acting as her counsel and adviser, and represented to her that he was a lawyer, and would attend to her business for her, and would protect her interests, but that he betrayed her confidence and trust; and finding against the validity of the deed from A. H. Miller to Joanna Miller, and against the validity of the deed from Margaret Whelan to her three infant sons, and against the validity of the contract between A. H. Miller and Margaret Whelan. And the conclusions of said master were that all the proceedings in the partition suit, the contract, and the several deeds should be set aside, and declared null and void; and that the lots in Sullivan should be held to be the property of A. H. Miller, and that the master in chancery should make to him a deed therefor, etc. The cause was heard by the court at the November term, 1892, and the court in part sustained and in part overruled the objections and exceptions taken by A. H. Miller and others of the defendants to the report of the special master, and in lieu of some of the master's findings found and decreed that the transactions and instruments and title thereby conveyed were a mortgage from which the complainant was in equity entitled to redeem upon equitable terms, to be thereafter determined by the court, and that the lots in Sullivan should be restored to A. H. Miller, etc. And the court again referred the cause to the master, to take additional evidence, and state an account, etc. A second decree was entered in the suit at the November term, 1893, upon the coming in of the master's second re-

port, and the exceptions thereto. It was, among other things, ordered and decreed by the court that defendant A. H. Miller should pay to the complainant the sum of \$47.63, and all costs of suit, and that execution should issue therefor; and that he should execute to the complainant a deed for the undivided one-half of the lands, and to the children of Harvey M. Whelan, deceased, for the other undivided one-half, and that, in case of his default therein, the master in chancery should execute such deeds; that the master in chancery should also execute a deed conveying to complainant and said children all the interest of Robert C. Miller, minor defendant, in said lands; and that complainant and said children should be entitled to possession, and writ of possession might issue, etc. Of the defendants in the court below, A. H. Miller alone appeals and assigns errors.

But, even if Joanna Miller is to be regarded as the real purchaser and owner under the deeds made to her, then it is perfectly manifest that her husband was her general agent in and about the entire transaction. The rule is that notice to an agent touching the subject-matter of his agency or in regard to the transaction in which he is engaged is notice to the principal. *Bryan v. Primm*, Breese, 59; *Doyle v. Teas*, 4 Seam. 202; *Williams v. Brown*, 14 Ill. 200; *Manufacturing Co. v. Holdfodt*, 86 Ill. 455. And this rule applies where the agent is the agent of both parties at the same time, as well as where he is the agent of but one. *Bank of New Milford v. Town of New Milford*, 36 Conn. 93. It follows, then, that when appellee, on February 24, 1890, executed a deed to Joanna Miller and delivered it to her agent, A. H. Miller, said Joanna Miller had notice of all facts relating to the farm and the title thereto that were within the knowledge of such agent and was chargeable with notice of the relation that said agent sustained to appellee, and of the duties that he owed to her in regard to said farm. She cannot, therefore, stand in a court of equity in the attitude of an innocent purchaser for value, without notice of defects in her title; nor can those who are her privies, and have merely succeeded to her rights. The position and rights of both are simply those of either a

mortgagee or those of a mere trustee under an equitable mortgage. A. H. Miller had represented himself to appellee as an attorney at law, and she, relying on these representations, had employed him as such in and about the business of clearing the farm in which she had an interest of incumbrances, and securing it, or as large a part of it as practicable, to her and her children. That he was not a lawyer, and had fraudulently imposed upon her in that regard, did not release him from the duty that in his assumed character of a lawyer he had voluntarily taken upon himself. By so assuming in respect to her the relation of an attorney to his client, he bound himself to the utmost good faith and fair dealing towards her, and for the preservation of her rights and interests. He was recreant to his part, and fell far short of performing his duty. He himself is estopped by his representations and promises from denying that he owed to appellee the duty of an attorney to his client. But, as between appellee and Joanna Miller and those in privity with her, the case stands upon the ground of notice. She, having notice of all the facts, and of the duty appellant owed to appellee, and of the breach of duty, took the land subject to the rights and equities of appellee. * * *

Decree of Circuit Court affirmed.

BORDERS v. KATTLEMAN.

142 Ill. 96; 31 N. E. R., 19.

[Supreme Court of Illinois. May 9, 1892.]

Shope, J. This was a bill in chancery by appellee against appellant, Borders, to set aside and rescind a sale of property on the ground of fraud practiced by appellant upon appellee, whereby the latter was induced to part with his property in exchange for a comparatively worthless note and mortgage of a third party. About the 1st of July, 1884, appellee deposited in the banking house of Borders & Boyle \$2,000, taking a certificate of deposit therefor, payable in six months after date at 5 per cent. interest per annum. A few months thereafter the firm became embarrassed and was dissolved by the retirement of Boyle. A new firm was formed, composed of

James J. Borders and appellant, who, for a valuable consideration, agreed to indemnify Boyle against all debts and liabilities of the late banking firm. Shortly after the maturity of the certificate of deposit appellee applied to appellant at the bank for payment of said certificate, who then, as the weight of proof tends to show, stated to him that he (appellant) had a tract of land in Randolph county worth \$2,800, which he had just sold and conveyed to Crozier at that price; that Crozier had paid \$700 in cash, and given his promissory note to him (appellant) for \$2,142, secured by mortgage on the land. It is also shown that he represented to appellee that the land was well worth \$2,800; was ample security for the note, which would be promptly paid at its maturity. He advised appellee, as appellee testified, to go and see Crozier, who he represented was well posted in respect of the land. The proofs leave but little, if any, doubt that the sale of the land to Crozier was not a sale in good faith. It appears, also, from the testimony that appellee did call on Crozier for information, and was assured by him that he (Crozier) had in fact bought the land for \$2,800, and given a mortgage on the same to appellant to secure a note of \$2,142. Appellant also, it seems, represented their tract of land had 40 acres cleared and under cultivation. Proof shows there were only 8 or 9 acres cleared on the tract. Appellant also represented to appellee, as the chancellor found from the evidence, that the firm of Borders & Boyle was so embarrassed financially as to endanger the loss of his money deposited with that firm; that he told appellee that he did not want to see him lose anything, and advised him to take the Crozier note and mortgage in exchange for his certificate of deposit, as the only sure means of protecting himself from loss. It is only just to say that appellant denies most of these alleged representations, or that he was guilty of deceiving appellee in respect of the value or nature of the land. Appellant knew that James J. Borders, one of the partners in the firm of Borders & Boyle, was perfectly solvent, and that the new firm of which appellant was a member had obligated themselves to Boyle, the outgoing partner of the firm of Borders & Boyle, to protect

him from all the liabilities of the late firm, which, of course, included appellee's certificate. Appellee not closing with the terms offered at once, appellant wrote him, urging speedy and prompt action in the matter. He wrote: "We are settling very fast with our depositors. In this way, delay is dangerous. * * * I could have used the note offered you, (Crozier note,) and can do so yet. If you want it on the terms offered, to wit, trade my note, for you to give me an order on Crozier for difference, which order, if not paid, shall not bind you, and you to become owner of full face of note and interest, which terms, if satisfactory, put your name on it, without recourse, and send same to me, and I will send you note and mortgage indorsed in same way; mortgages duly recorded. Answer by return mail. * * * I will take pleasure in showing you the land at any convenient time. I am too busy now. Besides, the ground is covered with snow, and you could not judge of the quality of the soil. I cannot put this matter off. Time is very precious with me now."

It is shown by the witness Stout that appellant told him he was about to sell this land to a man named Kattleman, and that if he cornered witness, and asked anything about the value of the land, for the witness to put the price up. After Borders had sold the notes to appellee, the same witness asked him (appellant) how he came to sell the land for the price he did, and appellant replied, as is testified, that he "had got hold of a man that had more money than brains;" and also said, in reply to a remark by the witness, that Crozier would never pay the notes,—“Of course, that is the calculation.” Most of the material representations shown by the evidence to have been made by appellant to appellee, to induce the purchase of the Crozier note and mortgage, are shown to have been untrue. Some of them, at least, if the evidence is to be credited, appear to have been made under circumstances strongly tending to charge appellant with knowledge of their untruthfulness, or, at least, he occupied such a position as to lead to the presumption of his knowledge of their falsity. He admits that he knew that J. J. Borders, one of the firm of Borders & Boyle, was perfectly solvent at the

time it is shown he was endeavoring to induce appellee to believe that the firm was insolvent, and that he was in danger of losing his money. He had owned the land in question some time before the pretended sale to Crozier, professed to be familiar with it, and must be held to have had notice of its value.

The point is made that, if the means were at hand by which appellee might have satisfied himself as to the truth or falsity of the representations, he was bound to do so, and, failing to avail himself of such means, he is not entitled to the relief sought. If appellant could make a defense based upon appellee's credulity and faith in appellant's representations, it could not prevail here. It appears that appellee did try to see the land before concluding his purchase from appellant. But, it being covered with snow, it could not, as stated by appellant in his letter, be properly examined; and, moreover, appellee was assured by appellant and Crozier, to whom the land had been conveyed, that the land was of the value of \$2,800, and that practically one-third of it was cleared and improved. Appellant says in his letter, as has been seen, that he will take pleasure in showing appellee the land at any convenient time; that he was too busy then; and that no proper judgment could be formed by his personal inspection of it at that time. While willing to show the land at some convenient time in the future, he was unwilling to delay concluding the transaction with appellee. He wrote: "I cannot put this matter off. If you do not want the note, say so, and I will place it elsewhere." He wanted an answer by return mail. Time was exceedingly precious to appellant then. Under such circumstances, it would be in the highest degree unconscionable to permit appellant to take advantage of the fact that appellee gave credence to his word, and relied upon his statements as true. In such case, the party will not be relieved from the consequence of his false representations, because the party thereby injured trusted him, and parted with his property upon false representation of fact, which he assumed to know to be true. Where the sale is of property at a distance, so that the purchaser has not the means at hand of ascertain-

ing the truthfulness of the vendor's representations, the vendee may rely upon their truth, and have a redress if they are shown to have been materially false. *Smith v. Richards*, 13 Pet. 26; *Maggart v. Freeman*, 27 Ind. 531; *Harris v. McMurray*, 23 Ind. 9; *Ladd v. Pigott*, 114 Ill. 647, 2 N. E. Rep. 503; *Savage v. Stearns*, 126 Mass. 207.

Here, as it appears, appellee did not have the ability to make any proper examination of the land without further time. Appellant, it would seem, was imperious in his demand that the transaction be closed at once, having first induced appellee to believe, as before stated, is shown by the evidence, that he was in danger of losing his money unless he took the Crozier notes and mortgage. Nor is it important that it should be affirmatively found that the untrue representation should have in fact been known to appellant to be false. It is well settled that it is immaterial whether a party misrepresenting a material fact knows it to be false, or makes the assertion of the fact without knowing it to be true; for the affirmation of what one does not know to be true is unjustifiable, and, if another act upon the faith of it, he who induced the action must suffer, and not the other. *Story*, Eq. Jur. § 193; 2 Pom. Eq. Jur. § 877; *Bigelow*, *Frauds*, p. 410 et seq; *Cooley*, *Torts*, (2d Ed.) 582; *Thompson v. Lee*, 31 Ala. 292; *Railroad Co. v. Tyng*, 63 N. Y. 653; *Allen v. Hart*, 72 Ill. 104; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Hicks v. Stevens*, 121 Ill. 186-197, 11 N. E. Rep. 241. So it has been held that, where the representations relate to facts which must be supposed to be within the defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. *Cooley*, *Torts*, 583; *Morse v. Dearborn*, 109 Mass. 593; *Morgan v. Skiddy*, 62 N. Y. 319. And so a party selling property is presumed to know whether the representations he affirmatively makes in respect of it are true or false. If he know them to be false, it is a positive fraud; and if he make them without knowing them to be true, for the purpose of inducing another to act upon them, it in equity amounts to fraud. *Miner v. Medbury*, 6 Wis. 295; *Smith v. Richards*, *supra*; *McFerran v. Taylor*, 3 Cranch, 270; *Glasscock v. Minor*, 11 Mo. 655.

Taking the evidence on the part of appellee, supported by the letters of appellant and proof of extrinsic facts, we are unable to say that the chancellor was not justified in finding that appellee was induced to part with his certificate of deposit by the statements and representations of appellant of matters materially affecting the transaction and which are shown to be untrue. All fraud and untrue statements, and that he made any untrue representations, are denied by appellant, and his version of the transaction is consistent with his honesty and good faith; but in the conflict we think the preponderance of the evidence is with appellee, and sustains the material allegations of the bill. The decree of the circuit court will accordingly be affirmed.

Acc. *Winegar v. Bollenbach*, 180 Ill., 222; *Coolige v. Rhodes*, 199 Ill., 24.

SECTION 5.—ACTUAL FRAUD—FRAUDULENT CONCEALMENT.

MASON v. BAUMAN.

62 Ill., 76.

[Supreme Court of Illinois. September Term, 1871.]

Mr. Justice Walker delivered the opinion of the Court:

This was a bill in chancery, filed by appellee in the Superior Court of Chicago, against the executor, heirs, and legatees of Charles R. Starkweather, deceased, to the November term 1867. The object of the bill was to obtain leave to redeem lots 5 and 6 in block 1, in Johnson, Roberts and Storr's addition to Chicago. It is not contested that appellee, in 1858, was so far indebted to different persons as to be greatly embarrassed in his pecuniary affairs, and was at that time a tenant of Starkweather, and was indebted to him in a sum of from \$1,500 to \$1,800 on account of rent.

They entered into an arrangement by which Starkweather was to aid appellee in paying his debts, and to enable him to do so, and as security for the rent due and to become due, appellee transferred to him a mortgage held on one Egerman on the lots in controversy, to secure the payment of \$7,500, due in eight years from its date. Also, as a part of the same transac-

tion, appellee executed a deed of trust to one Kinsella, for the use of Starkweather, on some lands in Du Page county, and assigned a certificate of purchase given by the sheriff, of a house which had been sold on execution. These assignments and transfers were absolute in form, but were subject to a defeasance which required them or such portions of them to be returned as should remain after paying appellee's debts. The claim is, whatever may have been its purpose, that this arrangement was made to secure Starkweather his debt for rent, and to enable him to raise money to free appellee from his embarrassment. Appellee also gave Starkweather a chattel mortgage. During the year ensuing this transaction Starkweather sold a portion of appellee's property and paid a part of his debts.

In September, 1859, appellee wrote Starkweather, urging him to sell the Eggerman mortgage at a price not less than \$4,500. He had previously held it at a higher price, but he yielded to the pressure which prevented its sale at the sum he previously asked. On the 3d day of November, 1859, appellee made an absolute assignment of the Eggerman mortgage to Starkweather for \$4,500, as is stated in the assignment; and under that date Starkweather gave appellee credit on his books for that sum for the mortgage, and \$325 on account of interest on the mortgage. At the same time he gave Starkweather a receipt for the sheriff's certificate of purchase of the house. Afterward, on the 22d of the same month, Starkweather transferred the mortgage on Eggerman to W. B. Hale, who purchased for himself, S. M. Smith, and H. K. Starkweather, of Massachusetts, and received from them the sum of \$5,000 therefor. Starkweather indorsed the note to Hale without recourse.

These persons all swear that they were bona fide purchasers of the mortgage for its value, and without any notice of the claim of appellee or any other person to the mortgage or note. They further swear that Charles R. Starkweather, after they purchased, had no interest in the mortgage, either directly or indirectly, and neither received interest or rents for himself until they again sold the premises to him after the foreclosure of the mortgage and their purchase under the foreclosure

sale. Egerman having made default in payment, the assignees of Charles R. Starkweather, in October, 1862, filed their bill to foreclose the mortgage and only made Egerman a party defendant. The bill was taken as confessed; a reference was made to the master, who reported there was \$8,173.75 due on the mortgage; and on the 23d of January, 1863, a final decree was rendered, ordering the payment of the money, or, on a default, that the premises be sold. On the 28th of June, 1863, complainants in that suit became the purchasers at a sale of the property under the decree. The time for a redemption having expired on the 10th of April, 1865, they conveyed the premises to C. R. Starkweather for \$7,000. He subsequently expended about \$1,000 in changing the grade, so as to render the house more accessible.

It is claimed that Starkweather was but a trustee, and that the second assignment, bearing date November 3d, 1859, did not change that relation; that those who purchased of him had notice that he was a trustee, and that they were dealing with a trust fund, when they took the assignment of the note and mortgage; and that when Starkweather afterward purchased the property of them, he acquired it burdened with the trust; it is also insisted that, at the time Starkweather received the last assignment, he then had an offer of \$4,800, which he fraudulently concealed from appellee; and on these grounds appellee claims the right to redeem from Starkweather as the mortgagee of the premises.

It is manifest that Starkweather was the agent of appellee for the sale of this note and mortgage up to the 3d day of November, 1859, when the last assignment was made by appellee to him; and if, from their relations, he failed to disclose all facts important to be known by appellee, he then failed to acquire a complete title to the note and mortgage, and he still remained an agent. That transaction, even if it were conceded that he practiced a fraud on appellee, did not divest him of power still to make a sale and to transfer the whole title to the purchaser, if the latter acted in good faith and paid value for the note and mortgage. Appellee did not then or at any subsequent time do any act manifesting an intention to withdraw the power to sell:

and on the 22d of November, when Starkweather assigned the securities to Hale, there was ample power to pass all of the title, whether legal or equitable, whether held by Starkweather or appellee, in the purchaser without notice who paid value. And Hale and his associates in the purchase swear unqualifiedly that they purchased without notice and paid \$5,000; and that Starkweather held no interest, either directly or indirectly, in these instruments, from the time they purchased them until they sold him the lots—some five years and a half afterward; and we find no witness who in anywise contradicts the statements of these witnesses.

It is, however, urged that they knew that Starkweather was appellee's agent, as he professed in his letters before and after the assignment of the 3d day of November, 1859, to be selling for another person, and not as the owner. We are unable to comprehend how that fact could charge them with notice that Starkweather was acting fraudulently toward his principal. A man is always bound by the fraudulent acts of his own agent perpetrated on a third person, whilst acting under his authority in reference to the subject of his agency; but we are aware of no rule or any adjudged case which holds that a person can ever be bound by the fraudulent acts of another man's agent. And why should they? They do not appoint the agent; they confer upon him no authority, and do no act that should in morals or in law render them liable for the acts of another man's agent upon whom they conferred no power. When Starkweather offered, as the agent of appellee, to sell them these securities, all they were required to do was to see that he had authority to sell and transfer the title to them, and this they found in appellee's assignment of the 3d of November. Without notice they were not required to look further and learn the relations that existed between the principal and agent. Here was commercial paper, fair on its face, regularly assigned, not due, and negotiable, offered by an agent for sale, and they purchase, without seeing on the papers any thing to excite suspicion, nor does the evidence disclose any thing to have put them on inquiry. Why, it may be asked, did they not acquire a title to this negotiable paper free from all equities that may

have existed between the principal and agent? No reason has been suggested, nor does any occur to us, unless they were chargeable with notice; and we find no evidence to charge them.

If any trust relation existed between Starkweather and appellee, beyond a mere agency, where is the evidence that the assignees of this note and mortgage knew of the fact, or where are the facts to put them on inquiry? We fail to find them in this record. The note not being due, the statute authorized them to purchase it, without notice of a defense, and to enforce its payment. Having done so we are not inclined to charge them upon mere conjecture, or that they might have known, because some of them were relatives of Starkweather.

But if Starkweather was guilty of a fraud, in what did it consist? It can not be said that he used any fraudulent means to induce appellee to sell these securities. Appellee had not only in the first instance given such authority, but we see from his letters that he was urging him to make a sale, as he declared he was unable to hold them. If Starkweather, when he sold, was but the agent of appellee, and he seems to have been, as he says in his letter of the 7th of November that he had that day procured the consent of the owner of these securities that he might sell, then he was bound to pay to him the full amount he received for them. And if he retained any portion of that sum without appellee's consent, it was a fraud on appellee, authorizing him to sue and recover any balance which he had failed to pay to him. And that Starkweather was still merely an agent when he made the sale seems to be true, or why say, on the 7th of November, when he wrote, that he had then procured the consent, when he had received the assignment on the 3d, four days previously? We can see no reason why he should misrepresent as to the time, as he could, no doubt, have just as readily induced the purchaser, to whom he was writing, to take these securities by saying that he had four days before that time purchased the note and mortgage, as by representing that he was selling for another. We must presume, then, notwithstanding the assignment, that he was acting as agent, and not as owner, in selling them.

For the want of perfect good faith in disclosing the fact that he received \$5,000 on the sale of these instruments, he was guilty of a fraud, not in selling, but in retaining a portion of the purchase money. The power to sell being ample and being legally exercised, the purchasers took the title free from all charge of fraud. It vested in them, we have seen, free and untainted with fraud and unburdened with equities of any kind. And when the purchasers converted these securities into real estate, by foreclosing the mortgage and acquiring the title to the mortgaged premises, they held them in like manner. And the property was in the market of the world, and could be purchased and held by any person who might choose. And as the securities had been extinguished and real estate procured with them, Starkweather might purchase and hold the land, precisely as he could had the money been collected and invested in other real estate. For his fraud he was liable to account for the unpaid portion of the purchase money he received. Appellee had no right to pursue either the note and mortgage or the land, as his only remedy was an action against his agent, the sale being in pursuance to a power well and lawfully exercised. There was no lien attached to the securities, and none could attach to the lots in controversy. Had Starkweather fraudulently sold these securities to the purchasers with a view of acquiring title to these instruments, and had he employed these purchasers as instruments to accomplish that purpose, or ultimately to acquire title to these lots, **then the fraud**, notwithstanding the power of sale, would have attached to and followed the property both in the hands of the fraudulent purchasers, and his own when he subsequently acquired the title, and that would have given appellee a right to redeem. But the evidence fails to show that such was the purpose, but, on the contrary, it is rebutted. Here was no perversion of a trust fund, as the trust, if one existed, was fairly executed according to the desire of the cestui que trust, and there is no ground for pursuing the property as being charged with a trust.

The court below erred in authorizing a redemption; but if Starkweather failed to pay over to appellee any portion of the

money received on the sale of the note and mortgage, then appellee should have a decree for that amount, with interest. The decree of the court below is reversed and the cause remanded.

Decree reversed.

DADY v. CONDIT.

163 Ill., 511; 45 N. E. R., 224.

[Supreme Court of Illinois. Nov. 9, 1896.]

Wilkin, J. On the 14th of January, 1891, the parties to this litigation entered into the following contract: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, to me in hand paid by James M. Condit, I, Robert Dady, agree to sell to James M. Condit, his heirs or assigns, 160 acres of land, located in section 32, Lake county, Illinois, being the northwest quarter section, known as the 'Jack Dugdale Farm,' at the sum of \$150 per acre, on the following terms: \$500 cash when I furnish an abstract showing a good and sufficient title; \$3,000 on or before August 1, 1891; one-fourth of the balance on or before August 1, 1894; one-fourth on or before August 1, 1897; one-fourth on or before August 1, 1900; one-fourth on or before August 1, 1903,—with interest on deferred payments at six per cent. per annum, payable semi-annually. Upon payment of the \$3,000 on or before August 1, 1891, I agree to give a warranty deed to the above described property, taking a mortgage on same for deferred payments. But, in case of failure on the part of J. M. Condit to make said payments of \$3,000, I agree to accept \$500 additional as liquidation of all damages to myself. In consideration of which, I, James M. Condit, agree to purchase the above-described property on the terms above mentioned, and in case of failure to make payment of \$3,000 on or before August 1, 1891, I agree to pay to Robert Dady, his heirs or assigns, \$500 additional in liquidation of damages. R. Dady, James M. Condit. Milwaukee, January 14, 1891." Subsequently Dady refused to perform the agreement, and Condit brought his action for damages. Thereupon Dady filed this bill to enjoin the action at law, and to set aside the alleged agree-

ment for fraud, and because it was never delivered. The circuit court found in favor of the complainant, and decreed accordingly. The appellate court of the Second district reversed that decree, without remanding the cause, and appellant Dady prosecutes this appeal.

On the former submission of the cause, we affirmed the judgment of the appellate court, adopting its opinion, which is reported in 56 Ill. App. 545. Subsequently a rehearing was granted, on the petition of appellant, and the cause again taken under advisement. Appellee having replied to the petition for rehearing, we have re-examined the evidence in the light of arguments, and reach the same conclusion announced in our former opinion. We still concur in the reasoning and conclusion announced in the opinion of Harker, J., above referred to, but, in order to avoid repetition, will briefly state in our own language these views.

The relief in the bill is based upon two theories therein alleged: First, that the agreement was procured through fraud on the part of Condit, by making false representations and concealing certain facts; and, second, that the contract was never consummated by delivery thereof. It appears from the evidence that prior to, and at the time of, the execution of this agreement, there was a rumor in Waukegan and vicinity that the Washburn & Moen Manufacturing Company might locate its plant at that place; and the result of that rumor was to produce activity in the sale, or rather, in the obtaining of options upon, real estate in that locality. Conversations between these parties in the months of November and December prior to the making of the contract had been had, but no definite agreement reached. A day or two prior to January 14th, Dady went to Milwaukee for the purpose of purchasing cattle. On the morning of that day, Condit called at his house, near Waukegan, as he says, for the purpose of further negotiating with him about the land described in the contract. Learning his whereabouts he immediately went to Milwaukee, where the contract was entered into. Dady claims—and the allegations of the bill as to fraud are based upon this claim—that, upon his inquiry, Condit informed him that there was no stir in real

estate in the vicinity of Waukegan, and that the manufacturing company had not decided to locate there, and, further, that Condit, knowing that the manufacturing company had determined to 'come to Waukegan, and that he would be materially influenced by that fact in the price fixed upon the property, concealed the information from him. The other theory of the bill is that the contract never became effective, because it was not delivered. It seems to us clear, beyond controversy, that, on the testimony of the complainant himself the question of fraud is eliminated from this case. He testifies over and over again that it was the understanding and agreement between himself and Condit that this contract was only to become effective, or, as he sometimes says only to be made, upon his returning to Waukegan and ascertaining whether Condit's statements were true; that is, whether there was any stir in real estate, and whether or not the manufacturing company had decided to locate in Waukegan. Nothing is better settled than that, in order to entitle a party to rescind or set aside a contract for fraud, he must not only prove the fraud, but also that he relied upon the fraudulent representations, and acted thereon. Kerr, *Fraud & M.*, p. 73 et seq.; *Douglas v. Littler* 58 Ill. 342; *Tuck v. Downing*, 76 Ill. 71. Therefore, even though the false representations and concealments averred in the bill were made (which are denied by the defendant), still, by his own positive proof that he did not rely upon those statements and did not act upon them, in making the contract (in other words that he did not believe the statements to the extent of acting upon them), complainant wholly failed to make out a case of fraud. And while, in the petition for rehearing, that branch of the case is insisted upon with earnestness, it was not so contended upon the former submission. * * * Judgment affirmed.

Acc. *Douglass v. Littler*, 58 Ill., 342; *Walker v. Carrington*, 74 Ill., 446; *Fauntleroy v. Wilcox*, 80 Ill., 477; *Illinois Midland Ry. Co. v. Town of Barnett*, 85 Ill., 313; *Jones v. Foster*, 175 Ill., 459; *Hooker v. Midland Steel Co.*, 215 Ill., 444.

SECTION 6.—CONSTRUCTIVE FRAUD.

THOMAS v. WHITNEY.

186 Ill., 225; 57 N. E. R., 808.

[Supreme Court of Illinois. June 21, 1900.]

Wilkin, J. This is a writ of error to the appellate court for the First district to reverse its judgment affirming a decree of the superior court of Cook county, based on a bill in chancery by defendant in error's testate, Richard U. Piper, against plaintiff in error, Granville S. Thomas. The bill alleges that for several years prior to January 24, 1893, the complainant had personally known the defendant, believed him to be an honest man, and intrusted and confided to him the care and management of his property in the city of Chicago (which is shown by the evidence to be worth about \$12,000); that at this time complainant was sojourning in Saratoga, N. Y., and was very much broken down in health, weak in mind and memory because of his advanced age, he being about 77 years old, and much depressed in mind and spirit by reason of the death of his wife, which occurred a few days prior to this date; that defendant, Thomas, knowing the weak and enfeebled condition of complainant, and with intent to overreach and defraud him out of his property by urgent and repeated requests promises to give him a home with his family in Chicago, render him medical care (defendant being a physician), and guard his interests, prevailed upon him to go and take up his abode at the home of defendant in Chicago; that while complainant, being in the condition described, was residing there, defendant, taking advantage of his position as medical adviser and taking advantage of the weakness of complainant, fraudulently and wrongfully induced him to transfer to him certain moneys, aggregating \$7,797, and execute and deliver to one Moore, trustee a deed purporting to convey to him, in trust for the benefit of defendant all his real property, part of which was located in Washington, D. C. (valued at about \$22,000), and the remainder in the city of Chicago, the deed containing the following clauses: "Said party of the first part is now making his home with Granville S. Thomas, in the city of Chicago, county of Cook, and

state of Illinois, and an arrangement has been entered into by and between said party of the first part and the said Thomas under and by virtue of which said Thomas has agreed to provide a home for the said party of the first part, and to care for him during the remainder of his natural life, without making any charge therefor, or receiving any compensation, except as follows: Upon the death of said Piper the said Thomas or his heirs or devisees, are to become the owners in fee simple of the premises hereinbefore described, subject to the condition that if said Thomas shall, at any time during the life of the said first party, fail to furnish and provide a satisfactory home and care for said party of the first part, said party of the first part shall have the right to terminate this agreement, and in such case said Thomas shall be entitled to receive at the rate of \$2,000 per annum from the 1st day of April, 1893, until the said party of the first part shall cease to live with said Thomas, as compensation for furnishing a home and caring for said party of the first part, for which sum said Thomas shall have a first and valid lien upon the premises hereinbefore described, said party of the first part to be entitled to receive the net rents and income from said property during his life." It is further alleged that about June 15, 1895, complainant left the home of Thomas, notifying him that he terminated the contract for care and board above mentioned. It is alleged the consideration stated as compensation for keeping complainant is unreasonable and unconscionable; that complainant is ready and willing to pay defendant a reasonable sum for board and care during the time of his residence with defendant, but the latter has refused to accept a reasonable sum and allow the trustee to release the deed aforesaid. The prayer of the bill is that the deed of trust may be set aside; that the defendant be allowed a reasonable compensation for the board and care of complainant, and that he be ordered to pay to complainant the balance of the said money, and account for the rents of the Chicago property.

The answer of the defendant, for the purposes of this opinion, may be treated as a general denial. The master to whom the cause was referred found and reported the allega-

tions of the bill to be substantially true. On the hearing the chancellor overruled exceptions to that report, approved the same, and rendered a decree accordingly. Complainant having died before the entry of the decree, the name of Anna V. Whitney, as executrix and individually, and Victoria A. Whitney, legatees, were substituted as complainants.

It is re-cited in the decree that complainant Piper gave to the defendant of his moneys on March 16, 1893, \$3,000, on April 12th following \$2,200, and on October 26th following \$2,000, that the deed mentioned in the bill was executed as therein alleged; that the value of the real estate thereby conveyed was \$34,000; that the defendant is entitled to retain of the moneys so received \$1,860 for board, room, and care of complainant from January 22, 1893 to June 17, 1895, and the sum of \$550 for services subsequent to January 14, 1893, part of the time as a physician and part of the time as nurse. The decree sets aside all of the transactions between the parties as having been procured by fraud and undue influence on the part of the defendant, and finds upon an accounting that the complainant is entitled to receive from the defendant the sum of \$5,354.30, and interest thereon from July 12, 1897, the date of the master's report; and it was ordered that the defendant pay said sum to the complainant with interest, and that the deed of October 17th be set aside, and that the trustee, Moore, reconvey the property within 10 days thereafter. Substantially the only ground upon which a reversal of the judgment below is insisted upon is that the evidence produced upon the hearing failed to sustain the finding and decree of the superior court. That the relation of principal and agent existed between the parties at the time of the transactions in question is clearly established by the testimony; in fact, it is not denied by plaintiff in error. And that the complainant was during the time an inmate of his house as a member of his family, and under his care as a physician and nurse, is also established beyond controversy. While the evidence is conflicting as to the mental and physical condition of complainant with reference to his ability to transact the business affairs of life, we think, in view of the extraordinary transactions had between the parties,

the weight of the evidence is that he did not possess that ability. There is a well-defined distinction between undue influence arising from acts which the law deems fraudulent and undue influence resulting from fiduciary relations existing between the parties. "Certain transactions are presumed, on grounds of public policy, to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence one towards another. The presence of such relationship creates a presumption of influence which can generally be rebutted by proof that the parties dealt as strangers, at arm's length; that no unfairness was used, and that facts in the knowledge of the one in the position of influence affecting the matter were communicated to the other." 27 Am. & Eng. Enc. Law (1st Ed.) 456. Pomeroy, in his work on Equity Jurisprudence (vol. 2, § 955), says: "Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject (undue influence) than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine." The same author says (section 947): "The term 'fiduciary or confidential relation,' as used in this connection is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused,—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?" Transactions between a party and one bearing a fiduciary relation to him are upon his motion *prima facie* voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence by establishing the fact that the party acted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part, and was equitable and just between the

parties, or, as some of the authorities say, that it was beneficial to the other party. The rule of law applicable to this case is well and clearly stated in 1 Beach Mod. Cont. § 825, as follows: "Where the grantor and grantee sustain relations of trust and confidence,—which includes not only cases where there exists a formal and technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, principal and agent but all cases in which confidence is reposed by one party in another,—and the trust is accepted under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties, which gave the other party an advantage or superiority, any transaction between them will be closely scrutinized by a court of equity, and relief will be granted against contracts entered into between them, unless the party claiming the benefit of the contract shows, by clear and convincing proof, that he acted with perfect good faith, and did not abuse or betray the confidence reposed in him; and where the donee is of superior mental capacity, or the donor of weak or feeble intellect, the presumption of fraud will require strong evidence to remove it." The rule of evidence here announced is recognized in *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609.

So far from the evidence in this record establishing good faith and fairness on the part of the defendant, it clearly appears that in each of the transactions set aside he obtained an unconscionable advantage of the complainant. On February 20, 1893, shortly after the complainant became a member of his family, he wrote an order to the National Safety-Deposit Company, to which he procured the signature of Piper, requesting the company to allow him (Thomas), to have access to "my box, No. 9,472, in the vaults of your company, at any and all times. This shall be your authority for the same," and shortly thereafter took from the box the \$3,000 first mentioned in the decree, for which he delivered to Piper the following: "Prof. R. U. Piper, M. D., to G. S. Thomas, Dr. To care and board medical attendance, from January 14, 1893, to April 1, 1893, \$3,000. Received payment. G. S. Thomas, Mrs. S. J. Thomas. Chicago, March 16, 1893." This extraordinary

charge is, upon its face, unconscionable and the evidence establishes beyond question that it was largely in excess of the reasonable charges for the services rendered. There is nothing in the evidence in the case tending to show that the complainant was afflicted with any disease requiring peculiar skill or special medical treatment, but, on the contrary, that he was simply enfeebled by old age. The \$2,200 mentioned in the decree was obtained on April 12th of the same year upon a check written by defendant and signed by complainant on the First National Bank of Chicago, where the latter had money on deposit. This sum, it is claimed, was paid for collecting an indebtedness of \$9,000 due the complainant from the estate of William Sharon, of California, for witness' fees in the Sharon-Hill case, the claim being that Piper had agreed to pay for his services in collecting the amount, \$3,000. This transaction is also, upon its face, unconscionable, the charge being, under the circumstances unusual and exorbitant. The evidence shows there was no dispute between the parties as to the \$9,000 indebtedness, but, on the other hand, that the trustees of the Sharon estate held the money ready to be paid over upon the final judgment in the Sharon-Hill case. On October 26th of the same year the other \$2,000 named in the decree was drawn by the appellant upon a check written by himself, and signed by Piper, and on the same day a receipt was given therefor as follows: "Received of R. U. Piper, \$2,000, with which to put an addition to house No. 2930 Lake Park avenue, which addition is a part of our agreement not expressed in the deed to George Moore, which, at the request of Dr. Piper, we kept to ourselves, as we did not consider it necessary to be a part of the same, as said addition is for his use. G. S. Thomas," On August 6, 1894, defendant wrote on the back of this receipt the following: "The within spoken two thousand dollars (\$2,000) was not paid to Granville S. Thomas as part payment on board, but as a bonus to get him to accede to the terms made in the agreement and used to make a good place for me. The same is not to be charged to Thomas, but to be considered as a bonus only,"—and this is signed by R. U. Piper. When it is considered that by the terms of the deed to Moore for

his use the defendant was to receive some \$34,000 worth of real estate for providing a home for complainant and caring for him during the remainder of his life, it can scarcely be claimed that this \$2,000 transaction was equitable and just to Piper, either as a bonus or for the construction of the addition. On the contrary, the receipt and indorsement upon it bear the impress of the hand of one overreaching another, and attempting to fortify himself against liability when he should be confronted with the fraud. It certainly needs no argument to show that the conveyance of all of complainant's real estate for support and maintenance during the remainder of his life, which, in view of his enfeebled health and old age, could be but a few years, was extravagantly unjust to himself. It is true that the complainant had the right, under the deed, to terminate the agreement, but upon condition that the defendant should be entitled to receive compensation at the rate of \$2,000 per annum from the 1st day of April, 1893, until he should cease to live with him, he (Thomas) to still have a first and valid lien upon the premises conveyed. While an agreement to pay \$2,000 per annum for his support, care, and medical attendance might not have been unreasonable if the transaction stood alone, yet we think taking into consideration the conveyance of the real estate the lien given thereon, and the proof as to reasonable compensation for support, care, etc., the charge was not just and reasonable.

Without extending this opinion by commenting upon the testimony of the several witnesses, we entertain no doubt that the decree of the chancellor holding the several transactions referred to voidable at the instance of the complainant below was fully authorized by the facts of the case. The further question then arises, is the compensation decreed to the defendant for the services he rendered the complainant reasonable and just? We have examined the evidence bearing upon this branch of the case, and are not prepared to say that the amounts allowed are not in conformity therewith. The judgment of the appellate court will be affirmed. Judgment affirmed.

Acc. *Mayeand v. Mayeand*, 194 Ill., 45; *Walker v. Shepard*, 210 Ill., 100; *Stahl v. Stahl*, 214 Ill., 131; *Baum v. Hartman*, 226 Ill., 160;

Leonard v. Bruth, 226 Ill., 422; *Roberts v. Weimer*, 227 Ill., 138; *Morgan v. Owen*, 228 Ill., 598; *Sears v. Vaughan*, 230 Ill., 572; see however, *Wilson v. Teufeld*, 213 Ill., 291; *Ball v. Ball*, 214 Ill., 255.

DOWIE et al v. DRISCOLL.

203 Ill., 480; 68 N. E. R., 56.

[Supreme Court of Illinois. June 16, 1903.]

This was a bill in chancery, filed October 15, 1901, by the appellee, Theodore D. Driscoll, as conservator of Mary Tindall, against the appellants, John Alexander Dowie, Orlando L. Tindall, Nancy H. Tindall, and Elizabeth T. Milner, in the circuit court of De Kalb county, to set aside a deed from Mary Tindall to said Dowie, bearing date August 5, 1901, conveying to him her homestead, located in Sycamore, in said county; also to set aside the transfer of two promissory notes, for \$1,500 each, indorsed and delivered by said Mary Tindall to said Dowie upon the same day upon which said deed bears date, and to require said Dowie to account for and pay over to the said appellee, as conservator, the sum of \$400, with interest from August 5, 1901, which said Dowie had before that date received from Mary Tindall; also to cancel a trust agreement entered into between said Dowie, Orlando L. Tindall, and Mary Tindall relative to said property so conveyed and transferred by Mary Tindall to John Alexander Dowie.

The bill, in substance, alleged that Mary Tindall, on the 5th day of August, 1901, was about 87 years of age; that she, by reason of her great age and feeble health, was mentally incapacitated to transact business and was susceptible to the undue influence of persons surrounding her in whom she had confidence; that said Dowie was the founder and overseer of a religious sect, and had great power and influence over his followers: that shortly prior to the 5th day of August, 1901, through the influence of said Orlando L. Tindall and Elizabeth T. Milner, the son and daughter of Mary Tindall, who were followers of said Dowie, said Mary Tindall, who was then under their influence and control, was introduced into the presence of said Dowie and became one of his followers; that said Dowie seeks to and does control the property interests

of his followers through various agencies, and represents that he can and does successfully conduct various business enterprises, aided and directed by the special and direct interposition of Diety, acting through him; that the said Mary Tindall, through the influence of said Dowie, and her said son and daughter, was induced to intrust all her property, consisting of her homestead and personal property, of the value of \$3,400, to said Dowie, and that at the time of the conveyance and transfer of her property to Dowie she was mentally incapable of comprehending the effect of such conveyance and transfer; that the appellee was appointed conservator of Mary Tindall on September 23, 1901; that he made demand upon Dowie to surrender to him the property of Mary Tindall, which he declined to do—and prays that the deed conveying said homestead to Dowie be set aside, and he be decreed to restore to the appellee, as conservator of Mary Tindall, said personal property, and that said trust agreement be canceled. * * *

The question of undue influence and mental incapacity were submitted by the chancellor to a jury. The jury found both issues in favor of the appellee, whereupon the appellants moved the court to set aside the findings of the jury, and to again submit said questions to a jury, which the court declined to do, and afterwards the court entered a decree, upon consideration of all the evidence produced by the respective parties, finding that Mary Tindall was mentally incapacitated, on the 5th day of August, 1901, to make said deed, transfer said personal property, and execute said trust agreement and that the execution of said deed and trust agreement and the transfer of said personal property were obtained through the undue influence of the appellants, and setting aside said deed, the transfer of said personal property, and said trust agreement, and requiring said Dowie to deliver up said notes to the appellee, and to account to him for said sum of \$400, with interest, from which decree the appellants have prosecuted an appeal to this court.

The deed sought to be set aside is in form a statutory warranty deed from Mary Tindall to John Alexander Dowie, conveying to him her homestead. The promissory notes assigned

and delivered to Dowie were for the sum of \$1,500 each, bearing interest at 6 per cent., and the \$400 had been delivered by Mary Tindall to Dowie in cash, and by him invested in the Zion Land & Investment Association, and a certificate issued to Mary Tindall therefor. The trust agreement was executed by John Alexander Dowie, Orlando L. Tindall and Mary Tindall, and provided that Dowie was to convert all of the property of Mary Tindall, received by him from her, into cash; that not to exceed \$2,500 thereof was to be invested in a house and lot in Zion City; that the balance was to be invested in the stock of the Zion City Bank, and that Orlando L. Tindall should hold all of said property in trust; that the income thereof was to be paid to Mary Tindall for life, then to Elizabeth T. Milner and Orlando L. Tindall for life, and then to Nancy H. Tindall, the wife of Orlando L. Tindall, for life, and upon the death of all of said beneficiaries said property was to vest absolutely in Dowie, his heirs and assigns. * * *

Hand, C. J. Delivered the opinion of the court. * * *

It appears from this record that Mary Tindall was very aged and quite infirm at the time the transfers sought to be impeached were made; that the appellant Elizabeth T. Milner lived with her and cared for her, and that Orlando L. Tindall and his wife frequently visited her; that they, as well as Mary Tindall, were followers of Dowie and believed in his teachings. It is apparent, from the situation of the parties, that the relation of the appellants to Mary Tindall was such that great confidence was reposed in them by her, and that the transfer of her property to Dowie and the execution of said trust agreement were greatly to the advantage of the appellants and to the disadvantage of Mary Tindall. Prior to the execution thereof she owned and controlled said property absolutely. After the execution thereof, if the same were valid, she only had a life interest in the income thereof; the residuum thereof having been transferred to appellant Dowie, and the immediate control thereof, by said transfers and trust agreement, having passed from her and become subject to that of said Dowie and Orlando L. Tindall. The law is well settled that where it appears that relations of trust and confidence exist

between parties to a transaction like this, and the parties receiving the transfer are benefited by such transfer, the court will indulge in the presumption that the party making the transfer was unduly influenced to make the transfer until such presumption is rebutted by the party benefited by the transfer. In 2 Pomeroy's Equity Jurisprudence (2d Ed.) § 951, it is said: "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party controlling the free action of his will and preventing any true consent equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced, which render him peculiarly susceptible and yielding—his dependent or fiduciary relation toward the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like. All these circumstances, however, are incidental and not essential. Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted. * * * The doctrine of equity concerning undue influence is very broad, and is based upon principles of the highest morality. It reaches every case, and grants relief 'where influence is acquired and abused, or where confidence is reposed and betrayed.' It is specially active and searching in dealing with gifts, but is applied, when necessary, to conveyances, contracts executory and executed wills."

In 27 American and English Encyclopedia of Law (1st Ed.) p. 456, the author says: "Certain transactions are presumed, on grounds of public policy, to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence, one toward the other. The presence of such relationship creates a presumption of influence, which can generally be rebutted by proof that the parties dealt as strangers, at arm's length, that no unfairness was used, and that facts in the knowledge of the one in the position of influence affecting the matter were communicated

to the other." And in *Marshall v. Colman*, 187 Ill. 556, 58 N. E. 628, on page 582, 187 Ill., and page 637, 58 N. E., this court said: "Where two persons stand in such relation to each other that confidence is necessarily reposed by one in the other and the one has over the other an influence which naturally grows out of that confidence the abuse of such confidence or influence to obtain an advantage at the expense of the confiding party will not be permitted to prevail, even though the transactions could not have been impeached if no such confidential relations had existed. *Tait v. Williamson*, L. R. 2 Ch. 55; 10 Am. & Eng. Ency. of Law, p. 327; 1 Am. & Eng. Ency. of Law, p. 375; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *White v. Ross*, 160 Ill. 56, 43 N. E. 336."

The doctrine repeatedly announced by this court is that courts of equity "will scrutinize with the most jealous vigilance" transactions between parties occupying fiduciary relations toward each other (*Casey v. Casey*, 14 Ill. 112), and that the burden of proof is on the beneficiary, in such cases, to establish the fairness of the transaction and that it did not proceed from undue influence (*Jennings v. McConnel*, 17 Ill. 148; *Zeigler v. Hughes*, 55 Ill. 288; *Ward v. Armstrong*, 84 Ill. 151; *Wickiser v. Cook*, 85 Ill. 68). In *Sands v. Sands*, 112 Ill. 225, on page 232, it was said: "The rule is where a person enfeebled in mind by disease or old age is so placed as to be likely to be subjected to the influence of another and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee." In *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119, it was held the burden of proof is upon the person obtaining the advantage in cases of fiduciary relations, "to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transactions with great severity." And in *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808, on page 231, 186 Ill., and page 810 57 N. E. that "transactions between a party and one bearing a fiduciary relation to him are upon his

motion prima facie voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence." It is not necessary that actual and intentional fraud be established (*McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609), and "it is immaterial by whom the undue influence is exercised, whether by a beneficiary or an outsider" (*Smith v. Henline*, 174 Ill. 184, 51 N. E. 227).

We have examined this record with care, and in view of the fact that the burden was upon the appellants to show that the transfers made to Dowie by Mary Tindall were not brought about by reason of undue influence exerted by them over her, growing out of the fiduciary relations which they sustained to her, and as the evidence was conflicting, and the chancellor had, by reason of seeing and hearing most of the witnesses while testifying, a much better opportunity than we to judge of the weight to be given to their testimony, we are unable to say that the decree is manifestly unsupported by the evidence. *Kinnah v. Kinnah*, supra. The decree of the circuit court will be affirmed. Decree affirmed.

Acc. *Rickman v. Meier*, 213 Ill., 507.

SECTION 7.—FRAUDULENT CONVEYANCE.

KINGMAN & CO. v. MOWRY et al.

182 Ill., 256; 55 Ill., 330.

[Supreme Court of Illinois. Oct. 13, 1899.]

The appellant company held two judgments against the appellee George G. Mowry, on which executions had been returned nulla bona. This was a creditors' bill by the appellant company to set aside certain transactions alleged to have been consummated in fraud of its rights, as the owner of those judgments. The allegations of the bill, in substance, were that the judgment debtor, for the purpose of hindering and delaying his creditors, had transferred all of his property to the George G. Mowry Implement Company, a corporation which he had caused to be formed for that purpose. The prayer of the bill was that the property so conveyed to the corporation

should be decreed to be subject to the lien of appellant's judgments. Appellees Ainsworth and Edward A. and William Mowry were made parties to the bill, on the alleged ground that they had fraudulently colluded with the debtor in the formation of the corporation and the transfer of the debtor's property, and claimed some interest therein. The joint answer of the defendants admitted the allegations of the bill as to the judgments, and alleged that prior to the rendition thereof the judgment debtor was seriously embarrassed financially, and unable to pay his indebtedness, and that he called a meeting of his creditors on the 24th day of November, 1896, of which meeting he gave each creditor, including the appellant, written notice; that at said meeting nearly all of the creditors, including the appellant, were represented; that all of the property of the debtor, and his indebtedness, were fully and truthfully made known to the said creditors at said meeting, and the same was verified by a representative of one of the largest creditors; that the debtor offered to assign and deliver all of his property, of every nature and kind, for the benefit of his creditors, without any preferences whatever, or that he would deliver to them his notes, with appellee Ainsworth, as surety, for the sum of 35 per cent. of the face value of their claims and that Ainsworth would cash said notes at 95 cents on the dollar, if the creditors, or any of them, preferred; that Ainsworth was present, and stated to the creditors that his proposition was based upon the understanding that the property of the debtor should be transferred to a corporation to be formed for that purpose, and the stock of the corporation should be assigned to him as security for the obligations assumed and any outlays made by him thereunder; that the representatives of the creditors then present, including the representative of the appellant company, were of opinion it was better for the interest of the creditors that the proposition to pay 35 cents on the dollar should be accepted, and that manner of settlement was accepted by all present, except the representative of the appellant, who declined on the ground that he was not authorized to accept it, but agreed to recommend the acceptance of the proposition to his principals, the principals, however, declining

to accept either proposition; that the debtor, in deference to the views of by far the greater number of his creditors, and in the belief that his creditors would be finally satisfied, proceeded to complete the formation of a corporation with a capital stock of \$15,000, divided into 150 shares; that all of the personal assets of the debtor were transferred to the corporation in full payment of the capital stock; that 10 shares of the stock were delivered to Edward A. Mowry in satisfaction of an indebtedness bona fide due him, and 5 shares to William A. Mowry, and the remainder of the shares (135 in number) were issued to the debtor, and that all of the shares were assigned and delivered to the appellee Ainsworth as security for his undertaking, as aforesaid; that all of the creditors, except the appellant and two or three others who held small claims, accepted the Ainsworth proposition; and that Ainsworth has paid to the creditors of the judgment debtor about the sum of \$6,000 in full discharge of their claims, and is ready and willing to settle with all others upon the same terms, but that the appellant company demands 50 per cent. of its claim, which Ainsworth is not willing to pay, and which the debtor, though anxious to do so, is unable to pay. The answer also disclosed that the real estate of the debtor was of no value, above the incumbrances thereon and the homestead right of the debtor, and that the debtor had executed a mortgage thereon to Ainsworth as additional security, and had also transferred to Ainsworth a policy of life insurance of the cash value of about \$400, as further additional security. The answer further averred that all the acts of the defendants were taken and had in good faith, as being for the best interest of all his creditors, and without intent of hindering or delaying any of them in the collection of their claims. Replication was not filed, but the cause was submitted to the court to be determined upon the bill and answer without proofs. The circuit court decreed that the transfer of the property to the corporation was in fraud of the rights of the appellant company, and that the property so transferred was subject to the lien of the executions issued on the judgments held by the appellant company, but that the appellee Ainsworth was equitably entitled to a superior lien on

such property to secure him for outlays made in obtaining satisfaction of the claims of the judgment debtor. On an appeal prosecuted by Mowry, the appellate court of the Second district reversed the decree of the circuit court, and refused to remand the cause. The case is before us on the further appeal of the appellant company.

Boggs, J. (after stating the facts). The truth of the averments of the answer was not challenged by replication, but the cause was submitted to the court for decision upon bill and answer. The answer was therefore to be accepted as true. *Pankey v. Raum*, 51 Ill. 88; *Fordyce v. Shriver*, 115 Ill. 530, 5 N. E. 87; *Cook Co. v. Great Western R. Co.*, 119 Ill. 218, 10 N. E. 564. It appears indisputably from the facts set forth in or by the answer that the transaction here sought to be invalidated was entered into and executed in actual good faith, and without any desire to defraud creditors. If, however, its legal effect was to work a fraud on the rights of the appellant as a creditor, it will be deemed fraudulent, as an inference of law, without regard to the motives which prompted it. *Lawson v. Funk*, 108 Ill. 502.

The contention of appellant is that the transfer by a debtor of his property to a corporation necessarily hinders and delays the creditor in the collection of his debts, and is in all instances a fraud, in legal contemplation. Adjudged cases are cited as in support of this position. We have examined these cases, and, while such transactions were condemned in the instances then under consideration, we do not understand it is to be deduced from them that it is a fixed rule of law that the formation of a corporation by the debtor, and the conveyance of all his property to the corporation, though made in actual good faith, is conclusively presumed to be fraudulent as a matter of law. One of such cases (*Bennett v. Minott*, 28 Or. 339, 44 Pac. 288) held, to quote from the opinion: "When a debtor, for the purpose of hindering and delaying creditors, organizes a corporation, and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity will set aside such

transfer at the instance of creditors, notwithstanding the incorporation is valid, and the corporate stock subscribed by the debtor is subject to sale under execution." And in another (*Kellogg v. Bank*, 58 Kan. 43, 48 Pac. 587) it was said: "A fraud may be perpetrated by an insolvent merchant through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual; and where it appears that this has been done for the purpose of hindering and delaying creditors, and enabling the debtor to retain the management and control of his property and of depriving his creditors of an opportunity to collect their dues, and when such insolvent retains substantially all the stock in the corporation, and no innocent person contributes any substantial sum to its assets, the court in sustaining attachments levied on the property, and directing the sale thereof to satisfy the claims of creditors, is warranted in treating the whole transaction as a sham." Expressions of the court in *Bank v. Trebein* (Ohio Sup.) 52 N. E. 834 (the case most relied on), give some support to the view entertained by counsel for appellant, but in that case it was said: "The formation of the corporation in no way facilitated the transaction of his [the debtor's] milling business and that connected with it. Nothing was added to his capital, unless we regard the few hundred dollars that may have been paid for the four shares of stock taken by the other members of his family such an addition. Evidently an addition to capital was not the controlling object. * * * The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside, and the property administered for the benefit of all the creditors of the fraudulent grantors. * * * We are clearly satisfied that the conveyance by Trebein of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the court." It is believed that in each of the cases relied upon some circumstance of fraudulent intent, as

the reservation of a trust in favor of the debtor, the design to create and administer the corporation for the mere purpose of enabling the debtor to conduct his business under the guise of a corporation, and escape, even temporarily, his creditors, or some improper disposition or manipulation of the stock interest of the debtor to the injury of his creditors, or other like consideration, determined the action of the court. Certainly, if such a conveyance be made with the consent and approval of all of the creditors, it would be valid. If, as here entered into after notice to all the creditors, and with the consent and approval of the greater number of them, as being the most desirable method of conserving the interests of all, without any purpose or design of defrauding any creditor, and the debtor retains the open ownership of a stock interest based upon the value of the property conveyed, and equally open, as was such property, to seizure and sale on execution against the debtor, as was the transferred property, the transaction cannot be deemed fraudulent, either in fact or as a matter of law.

It is urged that the transaction is fraudulent in law, for the reason, if effectual, that it prevents appellant, as a creditor, from seizing the property which the debtor owned and conveyed to the corporation, and forces the appellant to levy upon and sell the stock interests of the debtor instead. The appellant had no lien upon the property, nor any right to demand that the debtor should refrain from making any disposition of the same which his judgment and discretion, fairly and justly exercised, would dictate as proper and advisable in view of the rights and interests of his creditors and the situation and circumstances of his estate, provided the result of such action on the part of the debtor should leave the proceeds of the transaction still subject to the process provided by law for the collection of judgments. The law has no universal rule that a mere change of the property into a stock interest in a corporation must be denounced a fraud in legal contemplation, though it may be clearly seen it is not so in fact. The operations of a debtor in dealing with his property may so change its character as to make it more inconvenient to levy upon and sell the same under execution, without subjecting the debtor, as

matter of law or fact, to the charge that he has fraudulently hindered and delayed his creditors in the collection of their debts. Pledging the stock to Ainsworth to secure the money advanced by the latter was not a fraudulent act. The debtor had the right to borrow money wherewith to discharge his bona fide indebtedness, and to secure the party loaning the money by the assignment of his shares of stock. The judgment of the appellate court is correct, and is affirmed. Judgment affirmed.

SECTION 8.—FRAUD ON MARITAL RIGHTS.

FREEMAN v. HARTMAN.

45 Ill., 57.

[Supreme Court of Illinois. September Term, 1867.]

Mr. Justice Lawrence delivered the opinion of the Court:

This is a bill in chancery, filed by James T. Hartman and his wife, Henrietta Hartman, to set aside a deed made by her to her brother, Benjamin F. Freeman, the appellant herein, in November, 1862, three days before her marriage to Hartman. The deed conveyed, upon a consideration of \$200, her undivided interest in the farm formerly owned by her father, and since his death occupied by the widow and children. Her interest is shown by the proof to have been worth, at the time of the conveyance, between \$800 and \$900. The bill seeks a rescission of the deed on the ground of constructive fraud by the brother toward his sister and also because the conveyance was in fraud of the marital rights of the husband. The case came on to a hearing upon bill, answer, replication and proof, and the court decreed a rescission of the conveyance on the return of the purchase money and interest, and also payment of rent. The defendant appealed.

It appears that the father, Fauntleroy Freeman, left at his death a widow and seven children of whom the appellant, Benjamin, was the eldest. He was at that time not quite twenty-one years of age. His sister Henrietta, now Mrs. Hartman, complainant in this suit, was about nineteen. From the death of the father in 1856, to the marriage of Mrs. Hartman

in 1862 the family continued to live together on the paternal farm which was managed by Benjamin. They seem from the evidence to have lived harmoniously, and to have all contributed by their industry to the common welfare, Benjamin being the recognized head and manager of affairs abroad, and the mother and daughters performing the domestic labors. Mrs. Hartman was, for a part of the time, engaged in teaching, and the witnesses called by the appellant show she did much of the family sewing. The attempt therefore of the appellant to explain the low price he paid her for her interest in the farm, by setting up an indebtedness against her for her board and clothing, must be considered as failing. We must consider these expenses abundantly compensated by her personal services and her interest, as one of the heirs, in the profits of the farm. It appears, from the testimony of the mother, who was called as a witness by the appellant, that the deed to him was executed at his suggestion, and the reason then given was, that trouble might be avoided in the future. As the appellant must be regarded from the evidence in the record as having stood to his sister in loco parentis, we are inclined to the opinion that the conveyance to him of his sister's interest in the farm for less than one-fourth of its value requires an explanation which he has failed to give.

We do not, however, place our disposition of the case on that ground.

It is a settled rule that a voluntary conveyance by a woman, on the eve of her marriage, of property which her intended husband knew her to own, made without his knowledge, is void as against him, because in derogation of his marital rights and just expectations. *Strathmore v. Bones*, 1 Ves. 22; *England v. Downs*, 2 Beav. 522; *Logan v. Simmons*, 3 Ired. Ch. 487; *Tucker v. Andrews*, 1 Shepley, 125; 1 *Bright's Husband and Wife*, 221 and cases there cited. The case before us falls within this principle. The deed was made but three days before the marriage, and without the knowledge of Hartman, the intended husband. The conveyance, it is true, was not strictly voluntary, but it was made upon a consideration less than one-quarter of its real value, to a person standing to the

grantor in relation of trust and confidence, and for the avowed reason that, thereby, future trouble would be avoided, by which it must have been meant that, after the marriage, the husband would probably not consent to such a disposition by his wife of her interest in the paternal farm. If such a conveyance had been made to some person occupying no position that would enable him to exercise an undue influence over the grantor, and upon a purchase in good faith, without reference to the intended marriage, the inadequacy of the consideration would not be sufficient ground for setting the deed aside. But in the actual circumstances of this case, the deed having been evidently made in order to secure an inequitable advantage to the grantee, and because the husband's consent to such a sale could not be expected after marriage, we must hold the transaction to be as much a fraud in principle, upon his marital rights, as if the conveyance had been purely voluntary. Such a proceeding can not be placed beyond the reach of a court of equity by attempting, through the payment of one-fourth of the value of the property, to give to the deed the color of a bona fide sale. If the transaction had not been regarded as unjust to the intended husband it would hardly have been kept from his knowledge.

It is urged by counsel for the appellant, that, under the law of 1861, known as the married woman's law, the husband would have acquired no interest in his wife's land, even if she had not conveyed it, and, therefore, the deed was no fraud upon his marital rights. But a majority of the court have held in the case of *Cole v. Van Riper*, 44 Ill. 58, that that law is not to be construed as destroying the curtesy of the husband in his wife's realty.

The decree of the Circuit Court must be affirmed.

Decree affirmed.

See however. *Daniher v. Daniher*, 201 Ill., 489.

Acc. *Higgins v. Higgins*, 219 Ill., 146

SECTION 9.—CONTRACTS IN RESTRAINT OF TRADE.

LANZIT v. J. W. SEXTON MFG. CO.

184 Ill., 326; 56 N. E. R., 393.

[Supreme Court of Illinois. Feb. 19, 1900.]

Carter, J. Upon its bill in equity brought in the superior court of Cook county, appellee obtained a decree enjoining appellant, for a period of 10 years from February 3, 1897, from following or engaging in, directly or indirectly, in any capacity whatever, the business of manufacturing, selling, handling or dealing in paper receptacles, oyster pails, paper clothing boxes, folding paper boxes, or paper novelties of any kind or description whatever, and from furnishing any person, firm, or corporation with any information relating to or concerning any of said business, in the states of Illinois and Indiana, and each of them, and from continuing in the employment of the Fred Rentz Paper Company, and from dealing in said goods in connection with said company in said two states, and each of them. The bill and decree were based upon the following contract between appellant and appellee. "Chicago, Ill., February 3, 1897. As a special consideration for the purchase this day by the J. W. Sexton Manufacturing Company (an Indiana corporation doing business, also in Chicago) from me of my share and interest in and to the said business heretofore conducted by myself and Mrs. Margaret Banks at Chicago, Illinois, under the firm name and style of Joseph Lanzit Manufacturing Company, in accordance with the terms of a certain bill of sale made at Chicago, Illinois, this day, and a special consideration for the employment of me by said J. W. Sexton Manufacturing Company as a salesman, in accordance with a certain contract of employment made at Chicago this day, and for one dollar, and other good and valuable considerations, the receipt whereof I hereby acknowledge, I, Joseph J. Lanzit, of Chicago, Illinois, do hereby expressly covenant and agree as follows: That for the period of ten years from this third day of February, 1897,

I will not, anywhere in the United States of America, directly or indirectly, either alone or with any person, firm, or corporation, as employe, stockholder, officer, manager, or otherwise, or in an advisory capacity, set up, follow, or engage in the business of manufacturing, buying, selling, handling, or dealing in paper receptacles, paper oyster pails, clothing boxes, folding paper boxes, or paper novelties of any kind or description whatsoever; nor will I furnish any other person, firm, or corporation with any information relating to or concerning any of said business." Then follows a paragraph identical with the last, except that the territory named, instead of the United States of America, is the state of Indiana; and this, in turn, is followed by a paragraph in which the territory named is the state of Illinois; and it, by a paragraph in which the territory named is Cook county, Illinois, after which is the following: "All the above restrictions are subject to the exceptions of my employment with the said J. W. Sexton Manufacturing Company, as per said contract of employment this date. In witness whereof, I have hereunto set my hand and seal at Chicago, Illinois, this third day of February, A. D. 1897. Jos. J. Lanzit. [Seal.] Fred W. Job, Witness." The evidence shows that after Lanzit's term of employment, which was one year, had expired, he was employed by said Rentz Paper Company,—engaged, in part, in the same business in Illinois and Indiana as that carried on by appellee, and covered by the contract in question. But there is no allegation that said business was carried on in Cook county, or that appellant was engaged in any business covered by his contract in Cook county.

The only question for consideration is, were those provisions of the contract by which appellant agreed not to engage for 10 years in said business in Illinois, Indiana, and the United States void, because in restraint of trade? As drawn, the contract is severable, and may, if within the scope of the bill, be enforced, as to any valid provision of it, as to the territory therein mentioned, and declared void as to other provisions found invalid. The bill alleged and

the proof showed that appellee was an Indiana corporation, but authorized to do, and was doing, business in this state, as well as in Indiana; that it manufactured and sold its goods mentioned in the contract in both states, and transacted its business, to a great extent, from its office in Chicago; and the prayer of the bill was that appellant be enjoined from violating his contract as to the states of Indiana and Illinois. It is too well settled to require discussion that contracts in general restraint of trade are void, as being against public policy. But contracts only in partial restraint of trade are valid and enforceable, if reasonable and supported by a consideration good in law. *Linn v. Sigsbee*, 67 Ill. 75; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735, and cases there cited. In *Hursen v. Gavin*, we said (page 380, 162 Ill., and page 735, 44 N. E.): "A contract in restraint of trade is thus total and general when by it a party binds himself not to carry on his trade or business at all, or not to pursue it within the limits of a particular country or state. Such a general contract in restraint of trade necessarily works an injury to the public at large and to the party himself, in the respects indicated, and is therefore against public policy." See, also, *Harding v. Glucose Co.*, 182 Ill. 551, 55 N. E. 577; *Wright v. Ryder*, 36 Cal. 342. It is said, however, by appellee, that what was said in the *Hursen Case* was not necessary to the decision, and should not be regarded as authority in a case where the question is directly involved. It is also argued that the strictness of the rule laid down in the early cases has been greatly relaxed because of the different methods and increased facilities of communication and of transacting business, enabling the merchant or manufacturer to extend his trade over greater areas of territory than formerly was possible. Many cases are cited,—among them, *Gibbs v. Gas Co.*, 130 U. S. 409, 9 Sup. Ct. 553, 32 L. Ed. 979; *Tode v. Gross*, 127 N. Y. 485, 28 N. E. 469, 13 L. R. A. 652; *Match Co. v. Roeber*, 106 N. Y. 477, 13 N. E. 419; *Hodge v. Sloan*, 107 N. Y. 248, 17 N. E. 335; *Leslie v. Lorillard*, 110 N. Y. 534, 18 N. E. 363, 1 L. R. A. 456; and *Cowan v. Fairbrother*

(N. C.) 24 S. E. 212, 32 L. R. A. 829. But all of these cases fully recognize the rule that the contract must be reasonable, under all the circumstances of the case, and not in general restraint of trade, and that whether it is so or not is a question to be determined by the court. Thus, in *Navigation Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315, while the contract there involved was, by a divided court, held valid, it was said in the opinion of the court that it has generally been held that a contract not to exercise a trade in a particular state is invalid under the rule, on the ground that it would compel a man thus bound to transfer his residence and allegiance to another state in order to pursue his avocation, but that in this country such a mode of applying the rule should be received with caution. And it was there, and also in *Gibbs v. Gas Co.*, 130 U. S. 409, 9 Sup. Ct. 557, 32 L. Ed. 984 further said: "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy: One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general,—not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases, and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy."

The question is here presented whether said contract between appellant and appellee is or is not reasonable and consistent with the public policy of the state. The record shows that appellant was at the time of the making of the contract, engaged in said business in this state, and that, after his term of employment by appellee ended, he be-

came employed by the Rentz Company, engaged in this state, in part, in the same business. The effect of the contract, if enforced as decreed below, would be to deprive the public—the people of the whole state—of the industry and skill of appellant in the particular trade or business in which he may be most skillful and useful, and compel him to engage in some other business, or move to another state, in order to support himself and family; in other words, to expatriate himself, so far as his citizenship of this state extends, and go beyond our jurisdiction. Whether or not, under certain facts and circumstances, a valid contract might not be entered into not to engage in a specified business within the state, it is not necessary to here determine. As said above, “cases must be judged by the circumstances.” But we are of the opinion that a contract of the character, and tending to produce the effect, of the one under consideration, is, under all of the circumstances shown, unreasonable and against the public policy of this state. *Albright v. Teas*, 37 N. J. Eq. 171; *Oil Co. v. Nunemaker*, 142 Ind. 560, 41 N. E. 1048; *Machine Works v. Perry*, 71 Wis. 495, 38 N. W. 82; *Holmes v. Martin*, 10 Ga. 503; *Lange v. Werk*, 2 Ohio St. 519; *Keeler v. Taylor*, 53 Pa. St. 467; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173. For the period of 10 years the restraint is total, when considered with reference to the limits of the state, and so far as our laws and the jurisdiction of our courts extend. Besides, business and trade in this country are not usually affected by state lines, and there is nothing in this case to make it appear that the boundaries of this state or of the state of Indiana, or of both of them combined, are the reasonable boundaries of the territory covered, or intended to be covered, by the business or trade mentioned in the contract, and necessary for the protection of appellee in its purchase from and contract with appellant. In the *Hursen Case* we said, “Where the restriction embraces too large a territory, it will be unreasonable and void, as being wider than is necessary for the protection of the party in whose favor it is imposed.”

True, cases may arise—have arisen—where it would appear that even a greater extent of territory than a single state would not be wider than necessary for the protection of the covenantee from the competition intended to be guarded against. But this is not the only test of the validity of the contract. The interest and welfare of the public are of paramount importance. If a contract is in restraint of trade throughout an entire state, it may be void, as against public policy, although it may appear not to be unreasonable when considered merely with reference to the extent of the business of the covenantee, and the protection intended to be secured to him. If such were not the rule, then the mere magnitude of the business and trade involved in the contract would determine its validity, overriding all questions affecting the public welfare.

The decree enjoining the appellant from engaging in said business in the states of Illinois and Indiana is erroneous, and should have been reversed by the appellate court. Whether so much of the contract as applies to Cook county only might not be enforced, it is unnecessary to determine, as there are no allegations in the bill to sustain such a decree. The judgment of the appellate court is reversed, and the cause remanded. Reversed and remanded.

Acc. *Union Strawboard Co. v. Bonfield*, 193 Ill., 420.

CHAPTER IX.

TRUSTS.

SECTION 1.—WHO MAY BE A TRUSTEE.

FARMERS LOAN & TRUST CO. v. LAKE ST. EL. R. CO. et al.
173 Ill., 439; 51 N. E. R., 55.

[Supreme Court of Illinois. June 18, 1898.]

Magruder, J. Delivered the opinion of the court. * * *

2. It is further claimed by the appellant that the court below erred in decreeing that the appellant be removed as trustee. Whether or not the decree was correct in ordering such removal depends upon the solution of the question whether the appellant was bound to comply with the requirements of the act of 1887, as amended in 1889, regulating trust companies. Section 1 of said act as amended provides that "any corporation which has or shall be incorporated under the general incorporation laws of this state, being an act entitled 'An act concerning corporations,' and all amendments thereof, for the purpose of accepting and executing trusts, and any corporation now or hereafter authorized by law to accept or execute trusts may be appointed assignee or trustee by deed, and executor, guardian or trustee by will, and such appointment shall be of like force as in case of appointment of a natural person." Section 6 provides: "Each company, before accepting any such appointment or deposit, shall deposit with the auditor of public accounts for the benefit of the creditors of said company, the sum of \$200,000.00 in stocks of the United States, or municipal bonds of this state, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon," etc. Sess.

Laws 1889, p. 99. Section 8 of the original act provides as follows: "It shall not be lawful for any such company to accept any trust or deposit as hereinbefore provided, after the passage of this act, without first procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with the requirements of this act in respect to such deposit." Sess. Laws 1887, p. 145. The act of 1887, and the amendments to it made in 1889, refer to corporations organized under the laws of Illinois. But section 26 of the act of July 1, 1872, concerning corporations, provides as follows: "Foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater power. And no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act." 1 Starr & C. An. St. p. 619. The appellant, the Farmers' Loan & Trust Company, is a corporation organized under the laws of the state of New York for the purpose of accepting trusts, and for other purposes. The act of 1887, as amended in 1889, regulating trusts, is made, by section 26 of the general corporation act, to apply to foreign as well as domestic corporations which come within the terms of its provisions. So far as appellant stands related to the act of 1887, as amended in 1889, its position is not different from that of a domestic corporation. The inquiry then arises whether the appointment of the appellant as trustee under the trust deed sought to be foreclosed by the bill herein comes within the requirement of section 6 of said act of 1887, as amended in 1889. It is conceded that the appellant has never complied with said section 6, in the matter of depositing with the auditor of public accounts the sum of \$200,000 in stocks or bonds or mortgages, as specified in said section.

It is said that the taking of a mortgage by a corporation to secure a debt to it is not within the prohibition of the statute, and that, as a trust deed is the same as a mortgage, a trust under a trust deed is not within the purview of the statute. The rule, however, that the statute does not apply to a mortgage or trust deed which is a mere security for a debt, includes only such mortgages or trust deeds as contain no special powers involving active trusts. The trust instrument, however, in the present case, imposes trust duties of an active character. This will readily appear by reference to the trust deed executed by the railroad company to the appellant and the American Trust & Savings Bank. By the terms of the trust deed the trustees are required to certify the bonds to be issued, and to superintend their sale and application. Such action by the trustees under the mortgage or trust deed necessarily precedes the sale of the bonds to be issued, and the incurring of the indebtedness evidenced thereby. Interest does not commence to run, nor are payments to be made, until such certification takes place. It cannot be said, therefore, that the trust deed secures any indebtedness to the trustees, or any indebtedness actually existing to those represented by the trustees at the time of the execution of the trust deed. By the terms thereof the trustees are to certify and deliver 6,500 bonds, amounting in the aggregate to \$6,500,000, to be first issued. The bonds are to be issued under the supervision of the trustees, as follows: 1,000 to retire 812 of the 6 per cent. bonds of the Lake Street Elevated Railway Company,—the old company. These bonds are to be reserved in the possession of the trustees, and delivered only upon the retirement and canceling of the old bonds. That is to say, whenever any of said 6 per cent. bonds outstanding are paid or retired, they are to be canceled, and the trustees are to certify and deliver to the railroad company, or its order, a proportionate number of the 1,000 thereby secured and reserved; 5,150 of the bonds are to be used in the acquisition of a right of way, and construction upon a designated route;

350 bonds are to be used for the lawful purposes of the company, in the discretion of the directors. The 5,500 bonds last mentioned are to be certified and delivered by the trustees. Additional bonds are authorized as follows: 850 bonds for each additional mile of double-track road, fully equipped, for building the same; for paying claims for damages from operation or construction; for procuring right of way; for paying interest on its bonds during the first two years of its operation; 500 bonds for each bridge built over the Chicago river. The bonds in addition to the 6500 bonds are only to be issued by resolution or order of the board of directors of the railroad company; and the certificates of the president or vice president and chief engineer of the railroad as to the existence of the facts necessitating the issue of said additional bonds, together with certified copies of the resolution or order of the board of directors, are to be furnished to the trustee or trustees, and written orders, copies, resolutions, and certificates are made sufficient and conclusive evidence to the trustees to a statement therein contained and are to protect them in respect to a certification and delivery of any of said bonds thereunder. To assure the performance of these provisions, the trust deed provides as follows: "The said trustees, if they deem proper to do so, may appoint an agent of known integrity and business capacity, with full power to dismiss him and appoint another in his stead at pleasure, who shall have the right to attend all meetings of the board of directors, have free access to, and from time to time examine, all books of account of the party of the first part [the railroad company] appertaining to the application and expenditure of said proceeds of the sale of said bonds issued in excess of said 6,500 bonds, and shall make full report thereof to the trustees every three months, and as much oftener as they may from time to time require for the information of the bondholders under this mortgage; and the railroad company shall pay said agent a reasonable compensation for his services during the time of construction of said railroad, for which additional bonds

are desired as aforesaid, not to exceed, however, \$1,000,000 per annum." The trust deed further provides that if default shall be made in the payment of the interest when the same becomes due, when demanded, whether the same shall have continued for the period of six months or not, the trustee may, upon request of the holders of a majority in interest of the bonds then outstanding, enter into and take full possession of said railroad, and of all property thereby mortgaged, and hold, use, manage, maintain, and operate the same, and appoint such agents and managers as the trustees may see fit; collect and receive all revenues arising from such management, and apply the same to the expenses of the trustees in the performance of the trust. The power of entering may be exercised as often as occasion may arise in the judgment of the trustees pending the trust, and they may continue to exercise the power as they may deem expedient, until the holders of a majority shall otherwise request. The trust instrument further provides that the trustees shall permit such necessary changes to be made in the line of the railroad as may, in their judgment, be deemed advisable and advantageous. Insurance is to be effected, satisfactory to the trustees, and policies are to be delivered to and kept by the trustees, and to be made payable to them or their successors. The mortgagor is to be allowed to sell parts of the mortgaged property upon consent of the trustees who may release such property. The instrument provides, however, that no portion of the main line or branches of the railroad, or any part of the principal depots, stations, or terminal facilities, or other property, which in the judgment of the trustees may be essential to the due operation of the road shall be released, unless replaced by property which, in the judgment of the trustees, is of equal value and benefit to the efficient operation of the road.

Section 1 of the act of 1887, as amended in 1889, provides that any corporation authorized by law to accept or execute trusts may be appointed trustee by deed. The charter of the appellant authorized it to accept and exe-

cute trusts, and it was appointed trustee by the deed now under consideration, for the purpose of performing the active duties hereinbefore specified. In *Stevens v. Pratt*, 101 Ill. 206, it was held that the purpose of section 26 of the general incorporation act, as above quoted, was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law. In *Insurance Co. v. Bauerle*, 143 Ill. 459, 33 N. E. 166, it was held that under a devise to the Pennsylvania Company, and to certain other parties as trustees, the Pennsylvania Company had no power to act in this state as such trustee without compliance with the statute in question, which requires the deposit of \$200,000 in stocks or other securities, etc. The facts in the case at bar bring it within the doctrine of the case of *Insurance Co. v. Bauerle*, supra. It is said, however, that section 26 of the general incorporation act refers only to foreign corporations "doing business in this state," and that the appellant was not doing business in this state. We do not think that the evidence bears out this contention. In *Female Academy v. Sullivan*, 116 Ill. 375, 6 N. E. 183, it was held that receiving lands in this state by devise, and asserting ownership over them in this state, was a sufficient doing of business in this state to bring a foreign corporation within the purview of the language of said section 26. So, also, in *Insurance Co. v. Bauerle*, supra, it was held that, where the Pennsylvania company, a foreign corporation, received land in Chicago by devise, with power to sell and dispose of the same, and to lease it and collect the rents therefrom, and asserted in this state the ownership of said land, and assumed to sell and convey it, and brought suits in the courts of this state in respect to said lands and such alleged ownership, and for the enforcement of contracts in regard to the same, such company must be held to be doing business in this state, within the meaning of said section. In the present case the trustees, under the deed of trust executed by the Lake Street Elevated Railroad

Company, certified and delivered 7,574 bonds of \$1,000 each. From time to time, in 1894 and 1895, the appellant rendered and mailed to the railroad company bills for certifying bonds and accepting the deed of trust, and for services in the matter of the trust deed, and for receiving subscriptions, etc., which bills were received and paid by the railroad company. The trustees exercised constant supervision over the application of the bonds as issued. Correspondence was carried on between the railroad company and the appellant in reference to questions arising in regard to the issuance and delivery of bonds, and in regard to releases and accounts. On August 7, 1894, the appellant appointed an agent under the trust deed, who did a large amount of business in behalf of the appellant in Chicago, as such agent. This appointment was ratified and accepted by the railroad company, by resolution of its board of directors. The agent accepted the agency, and frequently examined the books of the mortgagor, and looked after the issuance and application of the several lots of authorized bonds. He made reports as agent to the appellant, and to the American Trust & Savings Bank. He gave advice in reference to the questions in dispute which arose between the appellant and the railroad company from time to time. From these and other facts appearing in the record, which it is not necessary here to specify, it is manifest that the appellant was doing business in the state of Illinois, within the meaning of said section 26. We are of the opinion that the court below did not err in decreeing that the appellant company should be removed as trustee, upon the ground of its noncompliance with section 6 of the act of 1887, as amended in 1889, regulating trust companies. It is unnecessary to consider any of the other grounds mentioned as justifying the act of the court below in removing said trustee.

Acc. *Morse v. Holland Trust Co.*, 184 Ill., 255.

SUMMERS et al v. HIGLEY.**191 Ill., 193; 60 N. E. R., 969.**

[Supreme Court of Illinois. June 19, 1901.]

In January, 1868, James M. Summers died testate in Ogle county, leaving his widow, Anna M. Summers, and four children, Martha Summers, Laura A. Summers, Edward Summers, and William Summers. His will was admitted to probate on the 18th day of February, 1868, and was as follows: "In the name of God, amen. I, James M. Summers, of the town of Polo, in the county of Ogle and state of Illinois, of the age of thirty-five years, and being of sound mind and memory, do make, publish, and declare this, my last will and testament, in manner following: that is to say: First. I give and bequeath to my beloved wife, Anna M. Summers, all my estate, whether real, personal, or mixed, to be used by her for her own support and for the maintenance and education of my children as herein named to wit, Laura A. Summers, Edward Summers, Martha A. Summers, and William Summers. Second. It is my will that my wife, who is hereby constituted my executrix, shall, in her discretion, bestow such sums of money on my father, from time to time,—Thomas J. Summers,—in case of his becoming so infirm by age or disease that he shall be unable to support himself. Third. It is my will that in case of the death of my wife before any of my children above named attain their majority, that whatever of my estate may be left when the youngest child, William Summers, shall have arrived at the age of twenty-one years, and over and above the education and maintenance of my said children, shall be divided equally among them, share and share alike: provided, always, that my said executrix, or a guardian to said children who may hereafter be chosen or appointed, shall have the power to pay to such one as they become of age such sums as, in their discretion, my estate shall then enable them to pay. Fourth. I hereby appoint my said wife, Anna M. Summers, sole executrix of this, my last will and testament, hereby revoking all former wills made. In

witness whereof, I have hereunto set my hand and seal this 24th day of December, A. D. 1867. And I also further will that my said executrix need not give bond for the execution of this, my last will and testament." The widow qualified, and has been acting as such executrix ever since. The testator, at the time of his death, owned, in addition to certain personal property, five lots in Polo, in said county; two of which are in controversy in this case. In 1872 the widow married Martin Grim, who was carrying on the business of a merchant tailor. In 1874, needing money in said business, he procured a loan of \$650 from the defendant in error, Harriet J. Higley, and with his wife, Anna M., executed and delivered to said Harriet a promissory note for that amount, payable two years after its date, with interest at the rate of 10 per cent. per annum. To secure the payment of this note, said Anna M. Grim, and he, as her husband, gave a mortgage on said two lots; that is, lots 10 and 11, in block 1, in Waterbury's addition to the town of Polo. The money was not procured or used for any purpose mentioned in the will, but only for the use of Martin Grim in his business. The note not having been paid, the defendant in error, on March 20, 1882, filed her bill of complaint in the Ogle circuit court to foreclose the same. Anna M. and Martin Grim, her husband, and the above-named Martha A. Summers, were made defendants. Said Anna M. Grim and said Martha A. Summers answered the bill, admitting the mortgage, but denying that it became or was a lien upon the property therein described. Said Martha A. Summers also filed a cross bill, setting up the will, and alleging that her mother, said Anna M., had no legal authority to make said mortgage, and that the same was a cloud on the title of herself and her brothers and sisters to said lots. Issues were made on the bill and cross bill. The cause was continued many years, until the youngest child reached his majority. The court, on the hearing at the April term, 1890, found there was due on the note \$1,755, and that the complainant was entitled to foreclosure, and dismissed the cross bill, and en-

tered a decree of foreclosure and sale as prayed. The said Martha A. Summers and Anna M. Grim then sued out this writ of error to reverse the decree.

Carter, J. By the decree construing the will the chancellor held that "the said Anna M. Grim, upon the death of said James M. Summers, became vested of the title in fee simple in said lands, subject to the conditional limitation that, in case of her death before any of the testator's children had attained their majority, then such fee simple would be cut down to a life estate, and the remainder, at her death, would vest in said children"; but held also "that all of said children having attained their majority in the lifetime of said Anna M. Grim, the said Anna M. Grim, by virtue of said will, became vested, and is now vested with the fee simple absolute in said land, and subject to said mortgage." If this is the proper construction of the will, the plaintiff in error Martha A. Summers had no interest in the property, and cannot be heard to question the correctness of the decree foreclosing the mortgage. But we cannot so construe the will. It is clear to our minds that by the first provision of the will, which devises the property to the widow, the testator intended to devise, and did devise the property to her, in trust for certain specified uses; that is, for her own support and for the maintenance and education of their children named in the will. The fact that she is beneficiary as well as trustee does not defeat the trust. 1 Perry, Trusts, § 59. The property is given to her to be used by her for those purposes. It seems to us the language is as plain as it would have been had it stated in express terms that the property was given to her in trust, and then had stated the uses to which it was to be devoted.

Section 13 of the act concerning conveyances (Hurd's Rev. St. 1899, p. 405) provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by ex-

press words, or do not appear to have been granted, conveyed or devised by construction or operation of law." While the provisions of the will do not contain any words of inheritance, still said Anna would, under the statute, have taken an estate in fee simple absolute in the property afterwards mortgaged by her if it did not appear by the will that a less estate had been devised to her. But it does appear that the property was devised to her upon certain trusts, which are declared in the instrument. This is made clearer by the third paragraph of the will, which provides that, in case of her death before any one of the children reaches his or her majority, whatever of the estate may remain when the youngest child, William Summers, shall reach 21 years of age, over and above the amount consumed in the maintenance and education of said children, is to be equally divided between them. Although the trustee might be dead, the trust would continue until the youngest child should reach his majority, and until that time he would have a beneficial interest in it for his maintenance and education. The will also provided that the property might be further diminished by payments out of it to each child as he or she became of age such sums as the amount of the estate would, in the discretion of the one then appointed to execute the trust, enable him to make. But this makes it clearer that the testator intended that eventually the property should go to his children. We are of the opinion, also, that a trust is declared by the second paragraph in favor of Thomas J. Summers, the father of the testator. By this provision the testator declares, in effect, that it is his will that his wife shall bestow upon his father, from time to time, in case of his becoming so infirm by age or disease as to be unable to support himself, such sums of money as, in her discretion, she shall deem necessary for his support. Such are the trusts declared by the will, and the property is to be used to carry them into effect. It is to be noted that no power of sale is given to the trustee, nor power to mortgage the property for any purpose, and while, if it became necessary, in carrying out the pro-

visions of the will, to sell the real estate, a court of equity would have the power to authorize the trustee to sell and convey the fee, we are of the opinion the will conferred no power on the trustee to sell or to convey by deed or mortgage. She was authorized to use the property for the purposes mentioned, not to sell or mortgage it. She could reside upon it with her children, or rent it, or make any proper use of it. To mortgage it to raise money to establish or maintain her husband, Grim, in business, was wholly unauthorized, and the mortgage was without force, and should have been so declared.

The contingency upon which the property was to be equally divided among the children when the youngest child should reach his majority, as provided in the third clause, never happened, and cannot happen hereafter, inasmuch as that period has passed, and the said Anna M. Grim is still alive. There is no other provision in the will disposing of the property, or what may be left of it after the termination of the trust. The fee not having been devised except for the purposes of the trust, we are of the opinion that it descended to the testator's heirs at law as intestate estate, subject to the trust, in the same manner it would have done had there been no will, and said James M. Summers had by deed conveyed the property to his wife in trust for the same uses. It is probable, from the terms of the will, that the testator believed that the complete execution and satisfaction of the trusts created would consume the estate. But, be that as it may, it remains true that the fee was not otherwise devised than in trust for the uses mentioned. It follows that Anna M. Grim had no title under which she could convey, by mortgage or otherwise, for the benefit of her husband, Martin Grim, and that the court below erred in decreeing a foreclosure of the mortgage. The bill to foreclose should have been dismissed, and no reason appears from the record why the cross bill to remove the mortgage as a cloud upon the cross complainant's title should not have been sustained. The decree is reversed, and the cause is remanded for further

proceedings in accordance with the views here expressed. Reversed and remanded.

Acc. *Burback v. Burback*, 217 Ill., 547; *Lewis v. Harrower*, 197 Ill., 315.

SECTION 2.—CREATION OF TRUST.

LANTRY v. LANTRY.

51 Ill., 458.

[Supreme Court of Illinois. September Term, 1869.]

Mr. Justice Lawrence delivered the opinion of the Court:

The courts have gone a long way towards repealing the statute of frauds, but we think not far enough to sustain the decree rendered in this case.

The facts are very brief. The appellee, Bernard M. Lantry, was the son of John Lantry, deceased, by a divorced wife. He was born soon after the divorce, and never lived with his father. In the fall of 1859, John Lantry, anticipating his own speedy decease, conveyed to his brother, Thomas Lantry, his farm of eighty acres, by an absolute deed. Thomas Lantry swears there was no money consideration paid for the deed, but his brother expected to be taken care of, as he was ill, and told Thomas, in reply to a question whether the boy was not to have something, to do as he pleased. "If the boy is worthy, give him what you please; if not, never look at him." Thomas has given appellee \$320 with which to purchase a team. On the other hand, various witnesses testify that John Lantry, before he went from Lasalle county, where he resided, to his brother's house in Chicago, expressed the intention of deeding the farm for the benefit of the boy, and applied to one or two of them to take the trust. Some admissions, rather general in their character, are also proven against Thomas Lantry.

The 4th section of the statute of frauds is as follows:

"All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writ-

ing, or else they shall be utterly void, and of no effect: Provided, that resulting trusts, or trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol."

It is not pretended that the alleged trust in this case is a resulting trust, or one created "by construction, implication, or operation of law." It is clearly within the language of the act, and it is not denied to be so, but it is said this is one of those cases in which courts decline to apply the statute, because, to do so would protect a fraud. There is a large number of cases of this character. Those which most nearly approach the case at bar are cited in Hill on Trustees, p. 151, notes, 3d Am. ed., and in 1 Story's Eq. Jur. sec. 256, 8th ed. The same cases are cited by both authors, and also by the counsel for appellee. The text in Hill, in support of which the cases are referred to, is as follows: "Where a person, by means of his promises, or otherwise by his general conduct, prevents the execution of a deed or will in favor of a third party, with a view to his own benefit, that is clearly within the first head of frauds, as distinguished by Lord Hardwicke, viz: that arising from facts, or circumstances of imposition; and the person so acting will be decreed to be a trustee for the injured party, to the extent of the interest of which he has been thus defrauded."

The language of Story, *ubi supra*, is as follows: "In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of equity hold themselves entirely competent to take from third persons, and a fortiori from the party himself, the benefit which he may have derived from his own fraud, imposition, or undue influence, in procuring the suppression of such acts."

It will be observed, the language of these authors is carefully confined to cases where the party against whom the parol trust is established has prevented the grantor, by fraudulent promises, from adopting some other mode of accomplishing his purpose which he was about to adopt, and induced him to place it in the power of such party to con-

vert the property to his own use. This is the exact limit of the cases cited. Thus, where a husband of a tenant in tail in remainder, by force and management, prevented the tenant in tail in esse, who was on his deathbed, from suffering a recovery for the purpose of providing for other parties out of his estate by will, Lord Thurlow held the estate was to be considered as if the recovery had been suffered. *Luttrell v. Olmins*, 11 Ves. 438, and 14 ib. 290.

So, where the issue in tail promised his father, the tenant in tail, to provide for the younger children out of the estate, and thereby prevented his father from suffering a common recovery for that purpose, equity will compel a performance of the promise. *Devenish v. Baines*, Prec. Ch. 4. So where an heir or residuary legatee prevents a gift of a legacy by promising to pay it. *Chamberlaine v. Chamberlaine*, 2 Term 34; *Oldham v. Lichfield*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. 638; *Thynn v. Thynn*, 1 Vern. 296; *Podmore v. Gunning*, 7 Sim. 644.

It will be observed that in all these cases there is something more than the mere receipt of the title to real estate, with a parol promise to hold it, subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third person, and to leave the execution to the party deluding him by a false promise, and through such false promise obtaining title to the property.

The cases are reviewed by Chief Justice Gibson, in *Hoge v. Hoge*, 1 Watts, 213, and the rule is laid down, that, in order to create a trust, there must have been some fraud, active or passive, in procuring the deed or devise—the mere breach of a promise to convey is not sufficient.

So, in *Perry v. McHenry*, 13 Ill., 236, this court said: "If the refusal to comply with a parol agreement constitutes such a fraud as to take a case out of the statute, then no case is within it; for a party has only to allege that a person contracting by parol fraudulently refuses to comply with the terms of his parol agreement, which he must do in

every case, or there would be no necessity for resorting to a court of equity to enforce it, and a case is made to which the statute does not apply."

The distinction is this. If A voluntarily conveys land to B, the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interposed and advised A not to convey directly to C, but to convey to him, promising, if A would do so, he, B, would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case B has had no agency in procuring the conveyance to himself. In the other he has had an active and fraudulent agency. In the one case he has done nothing to prevent a conveyance to the intended beneficiary. In the other he has, by false promises, diverted to himself a conveyance about to be made to another.

Giving to the evidence all that can be claimed for it, the present case only comes in the first category. There is not a particle of evidence tending to show that Thomas Lantry ever uttered a word to induce the conveyance from his brother to himself, or to prevent a conveyance from his brother to appellee. On the contrary, the evidence indicates that John Lantry at no time intended a conveyance directly to his son; and conceding to the evidence its utmost effect in favor of appellee; it appears John Lantry went to Chicago and asked his brother to accept the trust.

But, apart from the difficulty created by the statute, the evidence is extremely unsatisfactory, and the rule is, that even in that class of cases in which a trust can be established by parol, such evidence is not regarded with favor, and the court will not act upon it if it be not strong and irrefragable, or if it be contradicted by other testimony. Hill on Trustees, 167, and cases cited in notes. The evi-

dence in this case shows merely what intentions John Lantry expressed before he went to Chicago—which he may have wholly changed—and some very indefinite statements testified by one witness, to have been afterwards made by Thomas Lantry. There is no direct evidence that he ever made even a parol promise to hold the property in trust, and he denies, in his own testimony, that he ever did.

To the account put in evidence showing his expenses in regard to the land we can attach no material consequence. It is consistent with his own statement that the land was deeded to him by his brother to be used, so far as he might deem advisable, for the benefit of the boy, and no further.

The decree must be reversed and the cause remanded.

Decree reversed.

Acc. A trust in *Fishback v. Gross*, 112 Ill., 208; *Biggins v. Biggins*, 133 Ill., 211; *Pope v. Dapray*, 176 Ill., 478; not a trust in *Williams v. Williams*, 180 Ill., 361; *Brady v. Hulin*, 197 Ill., 291.

SECTION 3.—WORDS NECESSARY TO CREATE A TRUST—PRECATORY TRUSTS.

KINGSBURY v. BURNSIDE.

58 Ill., 310.

[Supreme Court of Illinois. January Term, 1871.]

Mr. Justice McAllister delivered the opinion of the court.

* * * The fourth section of the English statute, as to certain contracts, required the agreement itself to be in writing, signed, (*Wain v. Warlters*, 5 East, 10,) whereas the seventh section, respecting trusts, is worded very differently, and requires only that all declarations or creations of trusts should be manifested and proved by some writing signed by the party. Upon the strength of this peculiarity in the wording of the clause, it was held that letters and other written documents, though long posterior in date to the transaction itself, would have an operation equivalent to that of a formal and coeval declaration of trust. In *Forster v. Hale*, decided by the Master of the Rolls in 1798 (3 Ves. Jun. 696), and by Lord Chancellor Loughborough in 1800 (5 Ves. 308), the chancellor entirely agreed with the Master

of the Rolls in adopting the letter as a clear declaration of trust, by which he said he meant clear evidence in writing, that there was such a trust. It is not necessary, continued his lordship, that it should be a declaration, but a writing, signed by the party, may be evidence of a trust admitted in that writing. Nor was it necessary to produce an instrument expressly framed for the purpose of acknowledging the trust, it is fully sufficient, if the recognition or admission of it is incidentally made in the course of a correspondence. But when letters are to manifest a trust, there must be a clear demonstration that they relate to the subject; and it appears from *Forster v. Hale*, as well as from the cases of *Tawney v. Crowther*, 3 Bro. Ch. R. 161, 318, and *O'Hara v. O'Neil*, 7 Bro. P. C. 39, that if the letters afford evidence of the existence of a trust, the terms may be supplied aliunde. *Roberts on Frauds*, 101, 102.

"The principal point to be noticed is, that trusts are not necessarily to be declared in writing; but only to be manifested and proved by writing; for, if there be written evidence of the existence of such a trust, the danger of parol declarations, against which the statute was directed, is effectually removed." *Lewin on Trusts*, 63, citing *Forster v. Hale*, *supra*.

"When there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted to show the trust under which he actually holds the estate." *Browne on Frauds*, p. 110, sec. 111, citing *Cripps v. Jee*, 4 Bro. Ch. R. 472; *Hutchins v. Lee*, 1 Atk. 447. To the same effect, 2 Sug. on Vend. 7th Am Ed. 911; *Hill on Trustees*, 62.

A great number of cases were cited at bar, varying in facts and circumstances, though tending, perhaps, to establish the same rules of construction, or define the kind and degree of evidence which will satisfy the requirements of the statute. To cite and review them all would be a needless task, as the general conclusions arrived at are well stated in the elementary works referred to, and others of equal authority. Every case, after all, must depend upon

its own circumstances, and we must decide this case, not upon some particular feature of resemblance to this or that reported case, but upon the strength of its own undisputed facts, the circumstances by which the transactions were surrounded, and the application of those general principles by which courts of equity are governed in the exercise of a jurisdiction which reaches to the essence of things, regardless of forms, which probes the conscience and compels it to respond to the duties of every trust legally established, as from its own promptings it would be inclined to do, if left undisturbed by those passions to which human nature, unhappily, is but too prone.

We have seen that the trust is not necessarily to be declared in writing, but only to be manifested and proved by writing, and if there be written evidence of the existence of the trust, the danger of parol declarations, against which the statute was directed, is effectually removed. Lewin on Trusts, *ubi supra*.

Is there in this case written evidence of the existence of a trust? There are but two items of that tendency: the letter and the will.

The circumstance that the letter was written by the grantee to his mother, and not to the person claiming to be *cestui que trust*, is not material. The letter is somewhat ambiguous in language, but it is clear that it relates to the subject. The grantee says: "I spent all the morning with Burnside yesterday. He states, as I told you, that Simon had made over the Chicago property that was held in his name, to me." The words "had made over" might mean as a donation, as a mortgage, or as passing a nominal title for the use of the grantor.

It appears, as an extrinsic fact, that at the date of the deed, Buckner held the nominal legal title for the use of the heirs, to some seventy-five feet fronting upon the Chicago river, which had been thus conveyed to him by his father-in-law; and it was claimed in argument that the letter simply referred to that parcel. It is conceded that the language of the letter standing alone would limit the ref-

erence to that parcel. The person referred to as "Simon," undoubtedly means Simon B. Buckner. The words, "had made over," had reference to some conveyance. The writer must, therefore, have intended, by these words, the making of a deed, covering Chicago real estate, to which Buckner was a party as grantor, and himself as grantee. As there never was any such deed but that made by Buckner and wife to him, of the date of May 15, 1861, we must presume that that deed was the one intended by the words "had made over." That deed did in fact convey the parcel to which Buckner held the nominal title, but also all of Mrs Buckner's interest in the property therein described, which was all of her father's estate in Chicago. The evident purpose of this peculiar allusion to the matter in the letter, with the reference to something which the writer had previously told her, was to admit the trust to her, but in such terms as that others might not understand it. At that time Buckner was in the military service of the so-called confederate States, and his wife within their military lines.

But there is another feature to the letter that must not be overlooked. After mentioning the fact that Burnside had stated to him, as he had told his mother, that Simon had made over the Chicago property, &c., he says: "A new power of attorney is therefore necessary for you and myself. We made one out. Burnside will send it to you. I send you a copy for your own keeping, and keep one myself." This power of attorney was so referred to in the letter, as to incorporate it as a part of the letter. Upon examination it appears to relate to the entire Kingsbury estate in Chicago. By it Burnside is appointed attorney to transact all of the business of the estate, but restrained from disposing of any part of it, excepting to negotiate loans, under certain restrictions, and from making leases to extend beyond the term of three years. Now, if we are to assume that the letter had no reference to any of the estate, but the parcel of land held in Buckner's name, then, from the fact that the power of attorney gave Burnside control of the entire property, we must impute to him, an old and confidential friend of the

family, and a man of high position and character, and to Henry W. Kingbury, the only brother of Mrs. Buckner, upon the most affectionate and confidential terms with her and her husband, the wrongful and unnatural purpose of usurping control over Mrs. Buckner's share in her father's estate. This we will not do, because it is a more reasonable construction of these acts, and one far more just towards the parties, to hold that reference was had to the deed of May 15. That deed purports to be a bargain and sale, but upon the nominal consideration of one dollar. Upon the question of establishing a trust against the title of a volunteer, which is not favored in equity, the statement of a mere nominal pecuniary consideration will not be allowed to affect the construction or operation of the deed. Hill on Trustees, sec. 107, top paging 148; Young v. Peasly, 2 Atk. 256.

It appears from the evidence, and is uncontradicted, that the grantee neither paid nor became responsible to pay, by any promise, express or implied, any valuable consideration whatever for the property conveyed. Upon the question under consideration, the fact of the deed being made *ex parte*, as appears was the case here, without communication with the donee, is a circumstance to which much attention will be paid. Hill on T. 108; Cecil v. Butcher, 2 Jac. & Walk. 573.

These facts and circumstances form legitimate ingredients of evidence, in reference to which, and the relative situation of the parties, the letter should be construed. If the grantee had purchased the property and felt the independence of a purchaser, would he not have placed himself in that character. Would he have used such an unusual expression for such a relation, as that the grantor "had made over to him" the property? On the other hand, did he regard the conveyance as a donation to him? It is reasonable to suppose, under all the relations existing, that if he had received, or supposed he had, a gift from his sister and her husband, of real estate of the known value of half a million dollars, he would immediately, upon being satisfied of the fact, thus address his mother concerning so munificent a gift, without

the slightest manifestation of either surprise or gratitude? Such a thing is against all our knowledge of human nature and experience in the affairs of mankind. Why should Mrs. Buckner desire or intend to give away this vast fortune to her brother, who had sufficient already, and to whom she was under no particular obligations, and retain for herself and her own children only the pittance arising from the Waterbury property, of the value of less than four thousand dollars? No explanation has been attempted, and none, we apprehend, can be given. The circumstances all conspire to show, with irresistible force, that it was the intention of the parties at the time that Henry W. Kingsbury should take as trustee for one of the grantors, and not for his own benefit. And the language of the letter is a fair admission to that effect. It imports that the writer was not the real owner of the property. Then, as strengthening this position, we refer to the only other item of written evidence: the will, and so far as pertains to the present inquiry, it is immaterial whether that instrument was valid and operative as a will or not.

On the 25th of March, 1862, while Henry W. Kingsbury was at Fortress Monroe, in the State of Virginia, temporarily, in a military capacity, he wrote and signed with his own hand a will, by the first clause whereof, he declared that, "To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as, upon a fair appraisal, may be valued at that amount." By the second clause: "To my sister, Mary J. Buckner, I leave so much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago left by my father, Julius J. B. Kingsbury, deceased." By the third clause: "To my cousin, John J. D. Kingsbury, I leave my property in Waterbury, Connecticut," &c. By the last clause he declared that: "The remainder of my property, of every description, I leave to my devoted wife Eva." &c.

There is little doubt but the making the portion devised to his sister one-third, instead of one-half, subject to his

mother's right of dower, was the result of a misapprehension, arising from his youth and inexperience, and the manner in which the income had been previously divided. But it will be perceived that in the clause relating to the devise to his sister he uses the peculiar expression: "So much of the Chicago property held in my name." Whereas, in the devise to his mother it is: "So much of my Chicago property," &c. To his cousin it is: "My property in Waterbury," &c. To his wife: "The remainder of my property," &c. It is an undisputed fact that the only Chicago property held in his name was that conveyed by the deed of May 15th. Why this peculiarity of language, if he had not thereby reference to his sister's share thus conveyed? And why say "the Chicago property held in my name," in that connection, unless in deference to the truth? The expression excludes every idea but that of a nominal title, and is equivalent to saying "held by me in trust." The deed of May 15 purports, as we have said before, to be a bargain and sale. Is it not clear, then, from the letter and will, when viewed in the light of surrounding circumstances, that the agreement really made between the parties was not that stated by the deed? We think it is, and that, therefore, there is written evidence of the existence of a trust, and the danger of parol declarations, against which the statute was directed, is effectually removed. "If there is some written evidence inconsistent with the fact that the supposed purchaser was the actual purchaser, further evidence by parol is admissible to prove the truth of the transaction." 2 Sug. on Vend. (7 Am. Ed) 911.

"When there is any written evidence that the person apparently entitled is not really so, that will open the door to the admission of parol evidence to prove the trust, notwithstanding the statute." Hill on Trustees, 62.

The letter of the grantee makes reference to a particular parol declaration. As there appears to have been but one occasion upon which he had before then made any declaration to his mother on the subject, that will be regarded as the one intended. *Ghertrude v. Check*, 1 Adol. & Ellis, 57.

The declaration was made but a short time after the conversation between him and Buckner, as to the fact and purposes of the deed. The latter had visited his mother-in-law in Connecticut, and had probably told her about it. Then when Henry visited her in August or September, it was natural that she should make inquiries concerning it. She did. She inquired of him whether his sister's property had been turned over to him, telling him that Simon had told her so. He replied "That is so, but don't look concerned; it is only turned over to me for safe keeping; it will be restored to her."

If there were no written evidence of the existence of a trust, and the letter were clear and unambiguous in its terms, we are inclined to think, that under the doctrine of reference to words, parol evidence would not be competent for the purpose of manifesting and proving a trust, as required by the Statute of Frauds.

In Virginia, it has been decided that a letter containing a promise to make a deed of a tract of land "according to contract," is a sufficient memorandum under the Statute of Frauds, notwithstanding the terms of the contract are not mentioned; provided the party claiming the conveyance can prove by the testimony of one witness the price which was agreed to be paid for the land. *Johnson v. Ronalds*, Adm. 4 Munf. 77.

The doctrine of this case seems to be contrary to the general rule of the English courts, they having required, unless under certain exceptional circumstances, that the reference be to some document in writing, though it has not been deemed indispensable that such writing be signed. *Clinan v. Cooke*, 1 Sch. & Lef. 32; *Hodges v. Hersfall*, 1 Russ. & Myl. 116; *Saunderson v. Jackson*, 2 Bos. & Pull. 238, and the same rule as to a contract for the sale of land, was followed by Chancellor Kent in *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. R. 274.

Still it has been held that when a reference has been made to words by a will, the words may be proved by parol, not for the purpose of varying the terms of the will, or adding

to its contents, but for the purpose of describing or defining what was meant. *Sanford v. Raikes*, 1 *Merivale*, 646.

“And in some cases of trusts imperfectly expressed, parol evidence has been held admissible in explanation of the intent. Thus, when a testator devised his estate to his wife, ‘having a perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease,’ the wife afterwards died intestate, and a bill was filed by his two natural children for relief against his heir and next of kin, and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his estate, after her death, to the plaintiffs, and that she promised to do so, parol evidence was admitted in proof of this allegation.” 3 *Greenl. Ev. sec. 365*, p. 370, referring to *Podmore v. Gunning*, 5 *Simon R.* 485, S. C.; 7 *Sim.* 644.

It is not necessary to this case, and we do not commit ourselves to the doctrine of *Podmore v. Gunning*, to the full extent to which the learned author upon Evidence has accepted it; because the admission of parol evidence, in that case, may be consistently placed upon another ground, viz: that if a person obtains property under a will, upon a parol assurance that he will dispose of it in a particular way, the court will regard his attempt to keep the property, or dispose of it otherwise, as a fraud, and not allow him to set up the statute of frauds where a compliance with the statute would be to give effect to the fraud which it was intended to prevent.

From the best investigation we have been able to give to the question, and the authorities which bear upon it, we have arrived at the conclusion, that inasmuch as the written evidence clearly establishes the existence of a trust, parol evidence of the words referred to in the letter is admissible for the purpose of describing or defining what was meant by the letter, and as showing the truth of the transaction.

To search for artificial rules by which to exclude such evidence, beyond the just demands of the statute of frauds,

would be an attempted reversal of some of the most favorite maxims of courts of equity; would be the exercise of astuteness in the ways of defeating the plain intention of the parties, and aiding in the consummation of a fraud; for, when a trust is once established by legal evidence, equity regards every attempt by the trustee to appropriate the trust property to himself, to the exclusion of the rights of the cestui que trust, as a fraud, contemplated upon the latter.

The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property, for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust, and endeavored to execute it. Immediately after his death, his widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. Though her relations in life, and to the cestui que trust, became afterwards changed by another marriage, yet it is incredible that if she has been cognizant of the efforts which have been made to conceal the most important item of evidence of her former husband's relation to this vast property, and to wrest it from its proper channel, she can view them otherwise than with feelings of sorrow and regret. Her conduct has been the subject of severe criticism by counsel, but we are inclined to believe that she, like the unconscious infant whose name appears a plaintiff in the original bill, is but the involuntary instrument in the hands of designing men, who stand in no such relation to the memory of the deceased trustee as does Eva Lawrence.

The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, it must be executed.

This conclusion renders unnecessary any discussion of the question, made by appellants in the cross bill, as to the sufficiency of the acknowledgment of the deed by Mary J. Buckner, or of the question made by appellants in the original bill, as to the execution and probate of the will;

because, if properly executed and admitted to probate, the will would be governed by the laws of this State, where the property is situated; and the posthumous birth of the infant Henry W. Kingsbury, would, by those laws, operate as an abatement of all devises of property so situated. Gross' Statutes, p. 800, sec. 16, Wills. Besides, the testator was incapable of divesting the property held in his name, for the use of Mary J. Buckner, by any devise he could make.

The decree of the court below, dismissing both bills without prejudice, must therefore be reversed and the causes remanded, with directions to that court to dismiss the original bill absolutely, and to grant the relief prayed in the cross' bill, by a decree establishing the equitable title in Mary J. Buckner, to her proper share of the real estate described in the deed of May 15th, 1861, declaring a trust, and requiring the proper conveyance of the legal title to her, divested of any life estate in her husband, (he having renounced the same,) and of all right of dower in Eva Lawrence; that an account be taken between said Mary J. Buckner and all other parties interested in the estate of Julius B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and it be decreed accordingly.

Decree reversed.

Acc. *Ford v. McPherson*, 98 Ill., 496; *Jones v. Lloyd*, 117 Ill., 597; *Keith v. Miller*, 174 Ill., 64; *Kellogg v. Peddicorn*, 181 Ill., 22; *Whitsh v. Sprague*, 224 Ill., 461.

DAVIS et al. v. STAMBAUGH.

163 Ill., 557; 45 N. E. R., 770.

[Supreme Court of Illinois. Nov. 10, 1896.]

Baker, J. The bill alleges, in substance, that on and prior to September 20, 1892, Adam Stambaugh was the owner of certain described tracts of land, which were reasonably worth \$20,000; that he was 74 years of age, and suffering from an incurable disease, and anticipated an early death; that he reposed great confidence in his wife, Emma Stambaugh, to whom he had been married since September, 1863; that he desired and undertook to divide his real estate equitably between his

said wife and his three children and heirs at law, Artemisa Davis, Sabina Griffith, and Hattie Rodgers; that said Adam and his said wife, Emma, joined in making an absolute deed for said lands to one Thomas J. Welch, and that Welch immediately conveyed the same, by like, absolute deed, to said Emma Stambaugh; that said Emma stated to said Adam that, if he would convey the real estate to her, she would accept and hold the real estate, and dispose of the same in the manner to be directed at the time of the conveyance to her; and that he then informed her that he wanted the lands disposed of and divided as follows: The northwest quarter of section 12, etc., after his death, to be sold, and the proceeds equally divided between his said three children; and the southeast quarter of section 14, etc., and the other real estate, to be used and enjoyed by said Emma Stambaugh during her lifetime, and at her death to be equally divided among said three children. The bill charges that Adam Stambaugh was induced to make the conveyances, transferring title to her, by her oral promises to comply with his said wishes and requests and that such promises were the sole inducement and consideration for the conveyances, and that since the death of said Adam Stambaugh the said Emma Stambaugh has refused to carry out the directions of the deceased, or to perform the promises whereby she induced him to convey the lands to her, and claims that she owns the same in fee, and has the absolute right to control, sell, and use the same in any manner she may see fit. The prayer of the bill is for a decree establishing and executing the trust, and for other and further relief. The answer of Emma Stambaugh admits that on September 20, 1892, Adam Stambaugh was seised in fee of the premises, and was in feeble health; denies that he tried to or did dispose of his lands for the purpose of dividing the same among his children; denies that she induced him to make the deeds by any promises, or that the premises were conveyed to her in trust, or because of any inducements held out by her; and alleges that said Adam voluntarily conveyed to her, for the purpose of investing her with the absolute fee, to use and dispose of as she might see fit, unincumbered with any trust of any kind whatever. And said answer sets up the

statute of frauds, and insists upon and claims the benefit of the same. The cause was heard in the circuit court of McDonough county upon bill, answer, replication, and proofs, and a decree rendered dismissing the bill for want of equity.

Section 9 of the statute of frauds provides that "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect." 1 Starr & C. Ann. St. p. 1200. It appears from the evidence that Adam Stambaugh on the 14th day of August, 1892, made a will; that afterwards, in the presence of the witnesses J. G. Rippetoe and S. D. Barrett, he tore said will into three pieces, announcing to them that he wanted said will destroyed, and expressly called upon them to witness that such was his wish. The first contention made by appellants is that this will, signed by Adam Stambaugh, is sufficient to take the case out of the statute. There are several reasons why this contention cannot prevail. In the first place, the will and its provisions were expressly revoked and destroyed by said Adam, as is shown by the evidence of said witnesses. In the second place, the deed to appellee, which was executed and acknowledged long after the making of such will, makes no reference to the will or its provisions, either directly or indirectly, and there is therefore no ground upon which it can be claimed that the conveyance to appellee was for the purpose of carrying into effect the provisions of the will. And, in the third place, the trusts claimed in the bill are very materially different from the disposition of the property that the will made provision for. According to the trusts alleged in the bill, the land in section 12, upon the death of Adam Stambaugh, was to be sold, and the proceeds of sale equally divided between the three children, whereas by the will there was "devised to Emma Stambaugh, out of said tract of land," the sum of \$2,000, to be hers absolutely, said land not to be sold until one year after the probating of the will, and the rents for said land for that year directed to be paid to Emma Stambaugh; and, according to the trusts alleged in the bill, said Emma Stam-

baugh was given a life estate in the real estate other than that in sections 12 and 14, with remainder to the three children, whereas, by the provisions of said revoked will, all the real estate, other than that in sections 12 and 14, was devised to said Emma Stambaugh, "to be hers absolutely."

It appears from the record that a notice was given to take the deposition of Emma Stambaugh; that she did not appear, but that her attorneys appeared, and stated that they would agree to take her deposition if complainants would waive her signature to the same. This offer was declined. Thereupon the court made an order appointing a commissioner to take her deposition, and ordering that she "appear and give her deposition in said cause," and that she "shall sign the same." The deposition was taken, and she signed it, prefacing such signature with this statement: "As I put my name to this paper, I protest against it. It is the first time I have disobeyed my husband in any of the business. To-day I would rather go to the penitentiary than to take the step I am taking. But my attorney says the court will punish me if I don't. But I want the court to know I protest against doing this. I do not do it willingly." The substantial part of the deposition was this: "He [meaning Adam Stambaugh] said after he made those deeds to me—the squire came down and brought them, and my husband was in the bedroom, and I was not in the bedroom. After he came out I went into the bedroom, and my husband handed me the deeds and said, 'Here; take care of these deeds;' and after he handed me these deeds he said: 'Now, ma, take care of these deeds, and put them on record right away. Now, I believe you are perfectly honest, and, feeling that Sim is a notorious rascal, I have trusted this now in your hands. I want the first year's rent of both farms to go to good causes, and give you six years in which to settle this business up. As Sim has had \$1,000 more than the other girls (Mrs. Griffith and Mrs. Rodgers), I want them all equal.' The first year's rent of both farms was to go to good causes, and the second and third year's rent of the Davis farm was to go to Mrs. Griffith, and the fourth and fifth year's rent of the Davis farm was to go to Hattie, to make them equal with

Mrs. Davis, who had received \$1,000 before, and the sixth year I was to have the rent of the Sim farm to repair the place, and at the end of the sixth year the Davis farm was to sell, and I was to have \$2,000, and the rest was to be equally divided between the three girls; and the home farm was to be mine during my lifetime, and at my death was to be divided among the children equally; and this property (the Colchester property) was my own; and the timber was to be divided between the children equally after my death; and the furniture and all the household goods and money was left to me, without saying how to dispose of it. The rent money was not to be received by Mrs. Griffith and Mrs. Rodgers until the land is sold. He asked me to favor Mrs. Griffith by putting all her money in land. He wanted me to put her rent, and what the place sold for (her share of the place), in lands, and to be deeded to her and her heirs. When he got done telling me this, he said: 'Now, ma, you know Sim Davis has always felt head and shoulders above us all, and when I am dead and gone he will want to take this business into his hands. Now, will you lay your hand in mine that you will never sign any papers that will ever take this business out of your hands until it is settled?' And I laid my hand in his dying hand that I would never put my hand to a paper that would take it out of my hands until it was settled." The second contention of appellants is that this deposition, signed by Emma Stambaugh, the appellee, takes the case out of the statute, and establishes the trust. It will be conceded that the deposition cannot be given greater force than a sworn answer. And the doctrine is that, even if the defendant confesses the parol parts in his answer, yet, if he at the same time sets up the statute of frauds and perjuries in bar, he will have the benefit of the statute, and the court will not use the answer as a written declaration and proof of the trust. 1 Perry, Trusts § 85, and authorities there cited: Story Eq. Pl. § 763. The firmly-established doctrine is that, even where the answer confesses the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar. 2 Story, Eq. Jur. § 757. A party who insists upon his statutory right, and does not submit to waive

it, cannot be legally bound by a declaration or creation of trust which the statute declares to be utterly void and of no effect.

It is urged that the evidence shows a constructive trust, or trust ex maleficio. The settled doctrine is that equity does not, in the face of the statute, enforce verbal promise. 2 Pom. Eq. Jur. § 1056. The mere refusal of a trustee to execute an express trust, or the denial of the existence of the trust by the trustee, does not constitute such fraud as takes the case out of the statute. *Perry v. McHenry*, 13 Ill. 227-236; *Lantry v. Lantry*, 51 Ill. 458; *Scott v. Harris*, 113 Ill. 447; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323; *Champlin v. Champlin*, 136 Ill. 309, 26 N. E. 526; *Allmon v. Pigg*, 82 Ill. 149; *Rogers v. Simmons*, 55 Ill. 76. In order to take the case out of the statute, and establish a trust ex maleficio, the transaction by means of which the ownership of property is obtained must be in fact a scheme of actual deceit; in other words, there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. 2 Pom. Eq. Jur. §§ 1055, 1056. Otherwise the statute of frauds would be virtually abrogated. There is no evidence in the record that brings the case now before us within the rule that there is a trust whenever a person acquires the legal title to land by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose. *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Moore v. Horsley*, 156 Ill. 43, 40 N. E. 323; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Reed v. Peterson*, 91 Ill. 288; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Lantry v. Lantry*, 51 Ill. 458. Even if it was or could be held that the case of plaintiffs in error is not within the statute of frauds, yet the trusts that they urge in their brief and argument, as shown by the evidence, are materially and essentially different from the trusts that are alleged in the bill. Allegations and proofs must correspond. A complainant in chancery is not entitled to a decree where one case is stated in the bill, and a different case shown by the evidence.

The case before us affords a marked illustration of the wisdom of the statute of frauds and perjuries. Adam Stambaugh died, and left him surviving, his widow and three married daughters. The evidence of all four of them is contained in this record. No two of them agree, even substantially, as to what the verbal requests of Adam and the verbal promises of his wife were in respect to the final disposition to be made of the property conveyed by the deed. Each of the four states the requests and promises in the way that is most conducive to her own personal interest and advantage, and not one of the four would be content to have the supposed trusts established and enforced as testified to by either of the others. And the doctrine is that a trust will not be executed if the precise nature of it, and the proportions in which the cestuis que trustent are to take, cannot be ascertained. 1 Perry, Trusts, § 83, and authorities cited in notes. There was no error in rendering a decree that dismissed the bill out of court. It is affirmed. Affirmed.

See however. *Myers v. Myers*, 167 Ill., 52; *Pope v. Dapray*, 176 Ill., 478.

SECTION 4.—CONSIDERATION.

MASSEY and others v. HUNTINGTON.

118 Ill., 80; 7 N. E. R., 269.

[Supreme Court of Illinois. June 12, 1886.]

Craig, J. This was a bill in equity brought by Fannie H. Rexford to set aside a deed, bill of sale, and a declaration in trust executed by the complainant and Heber S. Rexford, Jr., her husband, to H. H. Massey, trustee, and Ephraim H. Denison, successor in trust. The three papers were executed on the fourteenth day of February, 1882. The deed, for an expressed consideration of one dollar and love and affection, and other good and valuable considerations, purported to convey five acres of land in Cook county, which was then owned by Heber S. Rexford, Jr. By the bill of sale, upon a like consideration, Heber S. and Fannie H. Rexford granted, bargained, sold, and delivered to Massey, trustee, and Deni-

son, his successor in trust, a promissory note for \$100 and an open account for \$2,191.21 against Norman Rexford; also one certificate of insurance, No. 25,962, in the Lumberman's Lodge, No. 1,815, of Knights of Honor, for the sum of \$2,000, bearing date the eleventh day of February, 1882, on the life of the said Heber S. Rexford, Jr., and payable at his death; also one policy of insurance issued by the Connecticut Mutual Life Insurance Company, numbered 134,395, on the life of the said Heber S. Rexford, Jr., for the sum of \$1,000, on the 10-year plan, dated May 13, A. D. 1875, and payable at his death. The declaration of trust provided that—

“The above conveyance of the real estate therein described, and the above bill of sale of the personal property therein described, are respectively made, executed, and delivered by the undersigned, Heber S. Rexford, Jr., and Fannie H. Rexford, his wife, to the said Henry H. Massey, or his successor in trust, for the following uses and purposes, to-wit: To hold the personal property, with power to sell, to lease, or incumber the real estate,” etc., “(1) to pay all necessary expenses, including reasonable compensation for said trustee's services attending the management of the property above conveyed, and the execution of the trust herein created; (2) to pay to the said Heber S. Rexford, Jr., during his life the sum of forty dollars (\$40) per month, and such other amount as he may deem necessary from time to time, for the comfortable maintenance and support of the said Heber S. Rexford, Jr., and Fannie H. Rexford, his wife; and in case of the death of said Heber S. Rexford, Jr., before the death of the said Fannie H. Rexford, his wife, then and in that case the said Henry H. Massey, or his successor in trust, shall pay to the said Fannie H. Rexford during her life the sum of forty dollars (\$40) per month and from time to time such other sums as he may deem necessary for the comfortable support and maintenance of the said Fannie H. Rexford; and all the rest and residue of such proceeds as aforesaid, and any or all of said personal property described in above bill of sale as may remain in the hands of the said Henry H. Massey, or his successor in trust, at the death of the said Heber S. Rexford, Jr., should he survive the said Fannie

H. Rexford, or at the death of the said Fannie H. Rexford, if she should survive the said Heber S. Rexford, Jr., the said Henry H. Massey or his successor in trust shall pay over and deliver the same to the following named persons, to-wit: Two hundred and fifty dollars (\$250) to be paid to Mrs. Maria D. Huntington, of Blue Island, Cook county, Illinois, mother of Fannie H. Rexford, if she should survive the said Heber S. Rexford, Jr., and Fannie H. Rexford; if she should not survive the said Heber S. Rexford, Jr., and Fannie H. Rexford, then and in that event the said sum of two hundred and fifty dollars (\$250) shall be divided, with the rest, residue, and remainder of the estate, as follows: One-quarter ($\frac{1}{4}$) thereof to Julia Rexford, mother of said Heber S. Rexford, Jr.; one-quarter ($\frac{1}{4}$) thereof to F. D. Rexford, of Centralia, Illinois; one-quarter ($\frac{1}{4}$) thereof to Norman B. Rexford, of Blue Island, Cook county, Illinois, and the remaining one-quarter thereof to Mrs. C. Caroline Massey, wife of said Henry H. Massey of Blue Island, Cook county, Illinois, or to their or each of their administrators, executors, or assigns; and the said Henry H. Massey or his successor in trust, shall, from the execution and delivery of this instrument hold the legal title of said real estate above conveyed to him, subject to the other trust herein set forth, in trust for said Julia Rexford, F. D. Rexford, Norman B. Rexford, and C. Caroline Massey, share and share alike; and at the time of the distribution of any remainder of said personal property, or the proceeds thereof, and the rentals and incumbrances aforesaid, as above set forth, the said Henry H. Massey, or his successor in trust, shall make, execute, and deliver to the said Julia Rexford, F. D. Rexford, Norman B. Rexford and C. Caroline Massey, or their or each of their heirs, legatees or assigns, good and sufficient deed or deeds to convey the legal title of said real estate to them, whereupon this trust shall cease and be determined."

The deed, bill of sale, and declaration of trust were acknowledged before a notary public on the day of their date, and delivered to the trustee, Massey, who filed them for record in the recorder's office of Cook county on the thirteenth

day of May, 1882. Heber S. Rexford, Jr., died intestate on the twelfth day of May, 1882, leaving a widow, Fannie H. Rexford, but no child or children, or descendants of any child. On the fifth day of September, 1882, the widow filed this bill to set aside the deed, bill of sale, and declaration of trust on the ground of undue influence; the bill charging that the papers were executed without consideration, and that the complainant was overreached in the execution thereof. It is also charged in the bill that the papers executed were intended as a testamentary disposition of property, and hence not binding on the complainant. The complainant, Fannie H. Rexford, died October 27, 1882. Previous to her death she made a will devising all her estate to Bessie B. Huntington, her sister, who was substituted as a party complainant in the bill.

As respects the execution of the papers by Heber S. Rexford, Jr., it is apparent from the evidence that they were executed after mature deliberation, and with a full understanding of their terms, conditions and the manner in which they would affect his rights, and also the rights of his wife. He and his wife were both in the last stages of consumption; and his desire, no doubt, was to make such a disposition of his property as would afford a reasonable support for himself and wife while living, and, after their death, have the remainder pass into the hands of his own relatives. While on a visit with a brother at Centralia, in January, 1882, he requested his brother to consult a lawyer as to the best mode of disposing of his property. It seems that Rexford's brother, after a consultation, informed him that the lawyer advised that a will might be defeated by an election of the widow, but that the matter might be arranged in the shape of a trust. Soon after this, Rexford returned to Cook county, and in an interview with Massey obtained his consent to act as trustee, and sent Massey, with a memorandum, to Judge Wallace to have the papers prepared. Wallace desired further information, which was obtained from Rexford, and within a few days the papers were prepared, and placed in the hands of Rexford and his wife for execution, and were executed and acknowledged as stated before. So far as appears there was no haste in the

preparation or execution of the papers; but mature deliberation characterized the whole transaction.

But it is said that Fannie H. Rexford, the wife, had not understood the nature of the papers and they were a fraud upon her rights. She never testified in the case, and what might have been her account of the transaction, had she been called upon as a witness, is mere conjecture. The evidence of the notary public before whom they acknowledged the papers is in the record. He stated that the papers were acknowledged on the evening of February 14, 1882, at the home of Mrs. Simmons. He also testified:

"When I got there, I had a little conversation before taking the acknowledgment. Then I took the paper, and asked Heber and Fannie Rexford if these were the signatures; if they were their free and voluntary act and deed for the purposes set forth in the deed. Heber and Fannie were sitting right near together, and Heber said 'Yes,' and Fannie gave an affirmative nod of her head in each of the three acknowledgments."

The three papers had been signed by Rexford and his wife before the notary called, and the presumption is that they had read them and understood the contents; and, if reliance is to be placed on the evidence of the notary,—and we perceive no reason to question it,—Fannie H. Rexford freely and voluntarily executed the three papers with a full knowledge of their contents and bearing on her rights. The complainant, Bessie B. Huntington, sole devisee of Fannie Rexford, testified to a certain conversation between Massey, the trustee, and Mrs. Rexford which occurred after the death of her husband; and reliance is placed upon this evidence to show that Fannie Rexford was misled in the execution of the papers. She testified that her sister, Mrs. Rexford, called on Massey for money to furnish a room, and he told her he had no money for that purpose, when Mrs. Rexford said it was not at all as she had understood it when she had signed the paper. She said she understood she was to have whatever she wanted, and that it was not to be a matter of Mr. Massey's deciding what she wanted; that she was simply to go to him when she wanted

it; and she repeatedly said it was told her so, and that was the way she understood it; and she said once that Mr. Massey understood it just so, she felt sure.

The declarations of a testator or grantor, made before or after the execution of a will or deed, might be competent evidence to prove mental condition, but such declarations are not competent to show undue influence or fraud. The law is well settled that a party cannot impeach a deed or other instrument or writing, which he has voluntarily executed, by his own parol declarations. *Dickey v. Carter*, 42 Ill. 384. As observed before, when the papers were executed, Rexford and his wife were both weak in body, and neither were expected long to live; but, so far as is shown by the evidence, their mental faculties were not impaired, and they were fully competent to transact any ordinary business. It is no doubt true that, after the death of Rexford, his wife became dissatisfied with the disposition which had been made of the property; but this record contains no sufficient evidence to establish undue influence or fraud practiced upon her; and she, and those claiming under her, must be held bound by the papers which she voluntarily executed.

Schaper v. Schaper, 84 Ill. 604, has been cited by complainant's counsel as an authority in her favor. We are entirely satisfied with the decision made in the case cited, but the facts there are so different from the facts of this case that it cannot be regarded as an authority here. *Thayer v. Thayer*, 14 Vt. 107, has also been cited. That case was doubtless decided right on its facts. There the wife did not join in the execution of the papers, and the transaction was entered into by the husband in order to defraud her out of her just rights, and the court properly held that she was entitled to relief. Other cases have been cited, but they will all be found, upon examination, to be so widely different in their facts from this case as not to be authority here.

But it is urged that the disposition of the property was testamentary in character, and hence not conclusive on the wife. If the deed which was executed by Rexford and his wife, purporting to convey the property to Massey, was an instrument

to take effect in the future, as upon the death of the grantor, then it might be regarded as testamentary in character. If on the other hand, the deed was an executed and delivered instrument, to take immediate effect, and nothing left for the grantor to do in order to complete the contemplated arrangement, then it is a trust. 1 Sand. Uses, 371. Upon an inspection of the deed under which the property was transferred to the trustee it is manifest that the transaction is an executed trust. The property is absolutely transferred to the trustee. The grantors retain no control whatever over it. The trustee takes the property, and, by the terms of the deed, he is required to pay Heber S. Rexford, Jr., during his natural life, \$40 per month, and such other amount as he may deem necessary for the support of Rexford and his wife; and, upon the death of Rexford before the death of his wife, then the trustee is required to pay her \$40 per month, and such other sum as he may deem necessary for her comfortable support. Upon the death of both Rexford and his wife a certain and absolute disposition of the property remaining is provided for. No power of revocation is reserved, nor was anything left for the grantors to do; but the property vested absolutely in the trustee, on delivery of the deed, for certain specified purposes. A testamentary disposition of property does not take effect until the death of the testator, and hence is within the control of the testator, liable to be changed or abrogated at his pleasure; but this transaction contains no element of that character. In 2 Pain, Eq. Jur. § 1001, the author says: "A trust is executed when no act is necessary to be done to give it effect,—when the trust is fully and finally declared in the instrument creating it." Such is this transaction.

It is said that the transaction has no consideration to sustain it. Where the trust is complete and executed, as in this case, a consideration is not material. *Ex parte Pye*, 18 Ves. Jr. 148; *Stone v. Hackett*, 12 Gray, 227; *Perry*, Trusts, § 98.

The decree of the circuit court will be reversed and the cause remanded for further proceedings consistent with this opinion.

Acc. *Lawrence v. Lawrence*, 181 Ill., 248.

